CLERK'S COPY

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 473

IN RE WILLIAM V. BRADLEY, PETITIONER

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 22, 1942.

CERTIORARI GRANTED OCTOBER 26, 1942.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No.

IN RE WILLIAM V. BRADLEY, PETITIONER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

INDEX.

	Original	Print
Proceedings in U. S. C. C. A., Third Circuit	a	1
Docket entries	a	1
Order to show cause	b	2
Affidavit of William V. Bradley	c	3
Motion for leave to intervene	d	4
Order granting motion for leave to intervene	e	4
Statement of evidence	1	4
Caption and appearances	1	4
Government's evidence:		
Louis Kapelski	2	5
Ludolf A. K. Josendale	32	22
Motion to dismiss rule	41	27
Respondent's evidence:		
William V. Bradley	47	30
Frederick A. Russell	61	38
Order and judgment	64	40
Application for bail and supersedeas	66	40
Testimony of Louis Kapelski (September 15, 1942)	83	48
Testimony of Louis Kapelski (September 16, 1942)	106	59
Order and judgment	125	69
Order amending judgment	127	70
Clerk's certificate (omitted in printing)	128	
Order allowing certiorari	129	71

[fol. a]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

October Term, 1941

No. 8140

In Re William V. Bradley

(Original—Criminal Contempt)

Docket Entries

Sept. 16, 1942. Rule to Show Cause why Wm. V. Bradley should not be adjudged in contempt, filed.

Sept. 21, 1942. Appearance of Thomas D. McBride, for respondent, filed.

Sept. 21, 1942. Affidavit of William V. Bradley, filed.

Sept. 21, 1942. Motion for Leave to Intervene, by Gerald A. Gleeson, U. S. Attorney, et al., filed.

Sept. 21, 1942. Order Granting Motion to Intervene, filed.

Sept. 21, 1942. Heard on Rule to Show Cause. Coram: Maris and Goodrich, JJ.

Sept. 21, 1942. Proof of Service of Rule to Show Cause on William V. Bradley, filed.

Sept. 21, 1942. Continued to Monday, Sept. 28, at 10.30 a. m.

Sept. 21, 1942. Subpoena issued to Ludolph A. K. Josendale to appear 9-28-42—Served 9-21-42.

Sept. 28, 1942. Heard on Rule to Show Cause, etc. Coram: Maris and Goodrich, JJ.

Sept. 28, 1942. Testimony of Witnesses for both sides.

Sept. 28, 1942. Order Adjudging William V. Bradley in Contempt, and Imposing Sentence, filed.

Sept. 28, 1942. Certified Copies of Order Adjudging Bradley in Contempt to U. S. Marshal.

Sept. 28, 1942. Copies of Order Adjudging Bradley in Contempt to District Attorney (Gleeson).

Sept. 30, 1942. Transcript of Testimony taken at hearing, filed.

Sept. 30, 1942. Proof of Service of Subpoena on Louis Kapelski, for Sept. 28, 1942, filed.

Oct. 1, 1942. Fine of $500.00 paid to Clerk in cash by Timothy J. McElroy, Esq., on behalf of Wm. V. Bradley.

Oct. 1, 1942. Order Amending Judgment, filed.

Oct. 1, 1942. Certified Copies of Order Amending Judgment to U. S. Marshal.

Oct. 1, 1942. Copies of Order Amending Judgment to U. S. Attorney.

[fol. b] In United States Circuit Court of Appeals for the Third Circuit, October Term, 1941.

No. 8140

In Re William V. Bradley

Before Maris and Goodrich, Circuit Judges

Order to Show Cause—Filed September 16, 1942

And now, September 16, 1942, it having appeared to this court from the testimony given in a certain proceeding in this court entitled National Labor Relations Board vs. Delaware-New Jersey Ferry Company, No. 7850, that on September 14, 1942, in the corridor of the United States Courthouse outside of and adjoining the courtroom of this court in Philadelphia, one William V. Bradley did by threats endeavor to influence, intimidate and impede a witness who was about to testify before this court in the said proceeding, to wit, one Louis Kapelski, and did succeed in his said attempt to the extent that the said Louis Kapelski, under the intimidation of the said William V. Bradley, did testify falsely in this court;

It Is Ordered that a rule be and the same hereby is entered against the said William V. Bradley directing him to show cause before this court on September 21, 1942, at 10:30 o'clock a. m., why he should not be adjudged guilty of contempt of court by reason of the foregoing.

By the Court.

Albert B. Maris, Circuit Judge.

[File endorsement omitted.]

[fol. c] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

[Title omitted]

AFFIDAVIT OF WILLIAM V. BRADLEY—Filed September 21, 1942

COMMONWEALTH OF PENNSYLVANIA,
County of Philadelphia, ss.:

William V. Bradley, being duly sworn according to law, deposes and says that he did not on September 14, 1942, or at any other time, in the corridor of the United States Courthouse outside of and adjoining the courtroom of your Honorable Court in Philadelphia, or elsewhere, by threats or otherwise endeavor to influence, intimidate and impede Louis Kapelski who was to testify before your Honorable Court in the matter of National Labor Relations Board v. Delaware-New Jersey Ferry Company, No. 7850.

Deponent did speak with the said Louis Kapelski on September 14, 1942, in the corridor of the said United States Courthouse but the words of your deponent on that occasion could not be construed as threatening upon any reasonable interpretation and certainly your deponent had no such intent and in using them meant no disrespect to your Honorable Court.

Deponent believes and therefore says that the said Louis Kapelski did not testify falsely in your Honorable Court as the result of any statement made to him by your deponent.

William V. Bradley.

Sworn to and subscribed before me this 21st day of September, A. D. 1942. Wm. H. Voehl, Notary Public. My Com. Exp. 2/10/1943.

[File endorsement omitted.]

[fol. d] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

[Title omitted]

MOTION FOR LEAVE TO INTERVENE—Filed September 21, 1942

And Now comes the United States of America, by its attorneys, Gerald A. Gleeson, United States Attorney in and for the Eastern District of Pennsylvania, and Thomas J. Curtin, Assistant United States Attorney in and for said District, and moves the court for leave to intervene in the within proceedings and to be made the complainant in this action.

Gerald A. Gleeson, United States Attorney. Thomas J. Curtin, Assistant United States Attorney.

[File endorsement omitted.]

[fol. e] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

[Title omitted]

ORDER GRANTING MOTION FOR LEAVE TO INTERVENE—Filed September 21, 1942

And Now, to wit: this 21st day of September, 1942, the above motion is hereby granted.

By the Court,

Maris, J.

[File endorsement omitted.]

[fol. 1] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1941

No. 8140

In re WILLIAM V. BRADLEY

Statement of Evidence

Philadelphia, Pa., September 28, 1942.

Before Hon. Albert Branson Maris and Hon. Herbert F. Goodrich, Circuit Judges.

Present:

Thomas J. Curtin, Esq., Asst. U. S. Attorney, amicus curiae.

Thomas D. McBride, Esq.; and Timothy J. McElroy, Esq. (of the New York Bar), for William V. Bradley, Esq., Respondent.

[fol. 2] Judge Maris: In the matter of Bradley, are you ready, Mr. Curtin?

Mr. Curtin: I am ready.

Mr. Shippen Lewis: If the Court please, in this Bradley matter I represent the witness, Mr. Kapelski, and I have talked with him and told him that there is nothing to do except to tell his story. I would be glad if the Court would allow my appearance to be entered as a friend of the Court.

Judge Maris: The Court will permit such appearance to be entered.

Mr. Curtin: As a matter of practice, will he enter his appearance as private counsel for Kapelski, or as amicus curiae, Your Honor having allowed me to enter appearance as amicus curiae?

Judge Maris: I think he may appear as a friend of the Court.

Louis Kapelski, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Curtin:

Q. Your full name, Mr. Kapelski?

A. Louis Kapelski.

[fol. 3] Q. Your address?

A. 101 East Elbon Road, Parkside, Chester.

Q. And your occupation?

A. General Manager, Delaware River Ferry Company, Chester, Pa.

Q. You appeared, did you not, as a witness in the matter of National Labor Relations Board, Petitioner, vs. Delaware-New Jersey Ferry Company, Respondent?

A. Would you repeat that again, please?

Q. In the case of National Labor Relations Board vs Delaware-New Jersey Ferry Company, you appeared, did you not, as a witness?

A. That is right, sir.

Q. Was your company a party to this action—the company by whom you were employed?

A. The company by whom I was employed?

By Judge Maris:

Q. Was it a party to that case?

A. No.

By Mr. Curtin:

Q. No?

A. No.

Q. Pursuant to a subpoena, did you come to this court? Pursuant to the subpoena did you come to this court?

[fol. 4] A. Yes.

Q. Now on the way, in the corridor of this court, did you meet anybody—in particular, did you meet a Mr. Bradley?

A. Yes, sir.

Mr. McBride: Now, may it please the Court, I would like to know whether this witness was under subpoena previous to his meeting Mr. Bradley. As Mr. Curtin states the proposition, it might appear so, but since the witness did appear twice, I understand he was under subpoena this second time.

Judge Maris: He might develop that. I think Mr. Curtin had better develop when this was. This witness was here twice. Do you have the dates? He knows them. Won't you get right to it? Develop the exact date on that point.

By Mr. Curtin:

Q. Now, can you recall the first time that you appeared in court in this matter?

A. The first time I appeared in court under subpoena was the 15th. That was Tuesday.

Q. Now, did you appear before that when you were not under subpoena?

A. I was in the building but I didn't—wasn't in the [fol. 5] courtroom and called upon. That was on the 14th.

Q. Now, did you appear at that particular time at somebody's request?

A. That is right.

Q. When you appeared first, on the 14th, it was at somebody's request?

A. That is right.

Q. Then you received a subpoena for the following day, the 15th?

A. That is correct.

Q. But you did not testify on the 14th?

A. That is right.

Q. Now, are you acquainted with a William V. Bradley?

A. Yes, sir.

Q. Do you know Mr. Bradley's occupation?

A. Yes, sir.

Q. What is it?

A. He is president of the union, Local No. 333, I think it is, a longshoremen's union, New York City.

Q. Will you tell us whether or not your company has a contract with that union?

A. We have.

Q. When does it expire?

A. When does it expire?

[fol. 6] Q. That is correct.

A. April 30, 1943.

Q. Now when you appeared in court on the 14th, can you tell us whether or not you met Mr. Bradley?

A. I did, sir.

Mr. McBride: Objected to, sir. It incorporates a statement of fact which the witness has himself negatived. He did not appear in court on that date, sir.

Judge Maris: I think that is right.

Mr. Curtin: He said he appeared here pursuant to a request of somebody on the 14th.

Judge Maris: But he did not testify. He said on that day he did not enter the courtroom. I think that is correct according to my memory.

By Mr. Curtin:

Q. You did come in the building?

A. I did come in the building.

Judge Maris: He came in the building.

By Mr. Curtin:

Q. You did not come in the courtroom on that day?

A. That is right; I came as far as the doorway.

Q. When did you first see Mr. Bradley, either in the corridor or the courtroom?

[fol. 7] A. I saw Mr. Bradley in the corridor on my way to the courtroom from the Market Street entrance.

By Judge Maris:

Q. On what day, Mr. Kapelski?

A. That was on Monday morning.

Q. The day that you did not actually come into the courtroom?

A. That is correct.

By Mr. Curtin:

Q. Was anybody with you at that time?

A. Yes, sir.

Q. Who?

A. Mr. Josendale.

Q. Did you have a conversation with Mr. Bradley at that particular time?

A. Yes, sir.

Q. Now, will you tell his Honor just briefly what you said to Mr. Bradley and what Mr. Bradley said to you? Tell us the conversation.

A. As Mr. Josendale and I were walking down the corridor towards this courtroom from the Market Street entrance over, I saw Mr. Bradley walking in the opposite direction. I hailed him, and I said, "Good morning, Mr. Bradley."

[fol. 8] He said, "Good morning. What are you doing here?"

I asked him the same question. I asked what he was doing here. I told him that I came up with Mr. Josendale on behalf—to testify against Herbert Garrison.

Q. Will you repeat the words again there? I didn't quite get that—the last sentence. What did you tell him, again?

A. I told him I came up here with Mr. Josendale to testify.

Q. To testify?

A. That is right.

Q. Go ahead.

A. Against Herbert Garrison, who they employed, as to the fact that he was no longer working for us, that we

discharged him. And he says, "That is the same case that I am up here on."

Q. Go ahead.

A. (After a pause.) Pardon the delay, but what I am trying to do is to be sure that I give the right words, which I had out there.

By Judge Maris:

[fol. 9] Q. We want you to do that.

A. I don't want to go ahead and make a mistake in any way, shape or form, but if I recall correctly, he says, "Well, if you are on their side," he says "you are going to get a"—I couldn't solemnly swear——

By Mr. Curtin:

Q. I don't want you to interpret the words: give us the exact words; we will do any interpreting.

A. I mean the point I am getting at is this: I could not safely recall whether he said "a damn good fucking" or "a good fucking".

Q. What happened after that, if anything?

A. If I recall, I asked him to wait a minute, and he didn't pay any attention to my words, or whether he replied, I could not honestly swear to it, but he walked on down the corridor, more or less in a hurry, and we came this way—Mr. Josendale and myself.

Q. I want you to place this conversation as closely as you can——

Judge Maris: Just a minute, Mr. Bradley, you are not to leave the courtroom. Come on back here.

Mr. McBride: Shall he sit up here?

Judge Maris: You had better have him up there with you.

[fol. 10] By Mr. Curtin:

Q. I want you to tell us where this conversation took place with respect to this particular courtroom.

A. Where it took place?

Q. What corridor?

A. In this corridor (indicating).

Q. The witness is pointing to the west corridor.

A. That would be the west corridor, or Tenth Street corridor.

Q. Tenth Street; that is correct. What direction from the Circuit Court of Appeals?

A. Toward the Market Street side.

Q. Toward the Market Street side?

A. That is correct.

Q. Approximately how many feet in distance?

A. Well, I would say it was probably one-third of the way in from the Market Street side.

Q. After this conversation was completed what did you and Mr. Josendale do then?

A. We walked down to this end—to this entrance of the courtroom.

Q. To this entrance of the courtroom?

A. That is right.

Q. I believe you did not testify that particular day? [fol. 11] A. I did not, sir.

Q. But subsequently you appeared here under subpoena and testified?

A. Yes, sir.

Q. You testified here before the Circuit Court of Appeals in that matter?

A. That is right.

Q. And if I recall properly, I believe you were subpoenaed again, and you appeared in court on the 16th, did you not, and testified?

A. That is correct.

Q. In other words, there were all together three appearances here in this building?

A. That is right.

Q. On the first, you did not testify; that is, on the 14th?

A. That is right.

Q. And on the 15th, or Tuesday, you did testify?

A. That is right.

Q. On the 16th you appeared back and you again did testify?

A. That is right.

Mr. Curtin: I now desire to offer in evidence testimony of the witness Kapelski on the two particular dates, namely on September 15th and September 16th.

[fol. 12] Mr. McBride: That is objected to, sir. Of course, I specifically waive any objection that I might have as to

the authentication of these notes of testimony and the record, but I do object, sir, on the ground that on the present state of the record at least, any testimony given by Mr. Kapelski on either of these dates is res inter alios acta as to this defendant because there is nothing shown on this record that would justify the Court in concluding that any testimony given by him was in any way affected by anything that was said to him.

Judge Maris: You mean before the introduction of these notes there is nothing.

Mr. McBride: No, sir, I say——

Judge Maris: If the notes are introduced, they will not afford any evidence of that—is that your contention?

Mr. McBride: Yes, sir; I say first that the record now, preliminarily, to justify the introduction, is not in such shape that it can be said to be admissible, in view of the complete failure of the record at this time to disclose that anything that was said was the result of or proximately [fol. 13] caused by or connected with in any way, whatever Bradley said to this witness.

Judge Maris: The Court overrules the objection and admits the notes of testimony solely for the purpose of proving that this testimony was given by the witness—not in any way to prove the truth or falsity of the matter testified to.

Mr. McBride: Your Honor grants me an exception?

Judge Maris: It being understood that the authenticity of the stenographer's transcription——

Mr. McBride: Is waived.

Mr. Curtin: That is waived.

Mr. McBride: I ask an exception, sir.

Judge Maris: You may have an exception.

Mr. Curtin: I would ask the Court to see that the entire transcript is in, but limit my offer to Kapelski on the two occasions.

Mr. McBride: I object to the entire transcript going in.

Judge Maris: You will have to cull from that the particular pages.

Mr. Curtin: We will do that together.

Judge Maris: Very well. Anything further from this [fol. 14] witness, Mr. Curtin?

Mr. Curtin: I was just debating with my conf-rere for one moment—will Your Honors excuse me just a moment, please?

Judge Maris: Certainly.

Mr. Curtin: You may cross-examine.

(A transcript of the testimony of Louis Kapelski in the matter of National Labor Relations Board, Petitioner, vs. Delaware-New Jersey Ferry Company, Respondent, No. 7850, United States Circuit Court of Appeals for the Third Circuit, will be found at the end of this day's testimony.)

Cross-examination.

By Mr. McBride:

Q. Mr. Kapelski, what time was it that you entered this building?

A. If I can recall correctly it was close to 10:00 A. M.

By Judge Maris:

Q. You mean on the first day?

A. On the first day.

By Mr. McBride:

Q. On the first day—that is the 14th?

A. That is correct.

Q. And you entered by the Market Street entrance?

[fol. 15] A. That is right.

Q. This courtroom, for the purpose of the record, being almost at the Chestnut Street entrance. Now, Mr. Kapelski, at the time you hailed Mr. Bradley, how far away from the entrance to this courtroom were you in yards, if you can estimate it?

A. That is fairly a hard question to answer, because after all you don't know the approximate yards in the length of the corridor.

Q. Well, it would be anywhere from 75 to a hundred yards away, wouldn't it?

A. Yes, I would say it would be all of a hundred yards away.

Q. You were with Mr. Josendale who is an official of one of the companies that was involved in that suit?

A. I was with Mr. Josendale.

Q. And you made known to Mr. Bradley that Mr. Josendale was an official of one of the companies—of the company for whom you were going to testify—didn't you?

A. Repeat that question.

Q. Let me rephrase it. You were the first one to greet Bradley?

A. That is right.

Q. He did not stop you?

A. That is right.

[fol. 16] Q. The conversation took place because of your stopping him and asking him what he was doing?

Mr. Curtin: Just a moment. I object to that because it does not necessarily follow that the conversation took place because my client said he'', sir.

Mr. McBride: Maybe it doesn't, but I am asking this witness.

Judge Maris: You may ask him. It is cross-examination.

By Mr. McBride:

Q. That is right, isn't it, Mr. Kapelski? The conversation took place because you stopped Mr. Bradley?

A. That is right.

Q. He did not stop you?

A. No, he didn't stop me; I don't think the man saw me.

Q. That is, had you not stopped him, you are confident that the conversation would not have taken place? That is right, isn't it?

A. Well, I--I couldn't swear to that because——

Q. All right, now when you spoke to him, you told him Mr. Josendale was with the company for whom you were going to testify, didn't you?

A. That is right.

[fol. 17] Q. And it was after you told him that, that you had the conversation in which he used the words you described?

A. Yes.

Q. Now, the conversation took place in a normal tone of voice, didn't it?

A. (After a pause): Well, there are several normal tones of voice. Now, if you mean by——

Q. Let me ask you this: did it take place in any louder tone than you are using now, or I am using now?

A. Well, I would say somewhat.

Q. A little louder?

A. Probably, yes.

Q. So therefore anything which Mr. Bradley said was easily heard by Mr. Josendale who Bradley knew at that time was connected with the company for whom you were going to testify; isn't that so?

A. Yes, it would have been very easily heard by Mr. Josendale.

Q. Now, you said that you were there at the request of somebody, and not under subpoena at that time?

A. That is right.

Q. That is right?

A. That is right.

Q. Who requested you to come?

[fol. 18] A. Mr. Josendale.

Q. And what arrangements did you make with Mr. Josendale, if any, respecting the time at which you were expected to get back to your employment?

A. He asked me if I would would come up and testify. I told him that I would, providing he could get me back to the office by 11:00 o'clock. He said, "Certainly," he saw—he felt—there was no reason why it could not be done.

Q. What time did you leave the courthouse on that day?

A. I left the corridor at approximately 11:30 A. M.

Q. And you had not been called up to that time?

A. No, sir.

Q. And you had no knowledge as to when or if you would be called?

A. No, sir.

Q. Now, after you told Bradley your purpose in being in the courthouse, he made this statement which you narrated—that is correct—about you were going to get——

A. He made that statement; that is right.

Q. Now, what did you understand he meant by that?

Mr. Curtin: Just a moment. I object to that.

Mr. McBride: The effect of ambiguous words upon a [fol. 19] man where it was charged he was threatening him—the very purpose of this proceeding is what this man knew him to mean by it.

Judge Maris: Overruled. Repeat the question.

(The question was read by the reporter as follows:

"Now, what did you understand he meant by that?"

The Witness: I understood that probably I was on a—coming up here at the request of Mr. Josendale to appear

on the losing side—but the side that he was on was going to give that company a damn good trimming.

By Mr. McBride:

Q. You mean in the case itself—that is the result of the case that was going to be heard—is that right, Mr. Kapelski?

A. Well, I—may I answer this——

Q. I would like you to make your answer as fully as you like.

A. I would like to answer that in this fashion: to begin with, when I came up here I did not fully understand the full case.

[fol. 20] By Judge Maris:

Q. What the case was about?

A. I did not know what the case was all about.

Judge Maris: All right.

By Mr. McBride:

Q. Now, Mr. Kapelski, you did not consider what Bradley said to be a personal threat directed against you, did you?

A. (After a pause) You mean that he meant as a threat of bodily harm to me?

Q. Bodily harm to you?

A. No.

Q. As a matter of fact you did not consider that he was threatening you personally in any way, did you?

A. I thought I just answered that question.

Q. Well, please answer it in more detail. We have our reasons for asking these questions, if you will just put up with it.

A. If you in your question—if you mean that he inferred in there that he was threatening bodily harm to me, I would say no.

Q. The sole purport of his statement, you took to be to the effect that you were on the wrong side of the case, and that [fol. 21] side was going to lose; isn't that right; Mr. Kapelski?

A. I think that is correct. I think that is the statement I made a few moments ago.

Q. The conversation itself took only a few seconds, didn't it?

A. That is correct.

Q. There was no attempt made by Mr. Bradley to draw you aside out of the hearing of Mr. Josendale, was there?

A. No, sir.

Q. And you did not leave the court—the building—as the result of what Mr. Bradley said to you, did you?

A. No, sir.

Q. Did you in any way alter, change, or modify any testimony as the result of anything that Bradley said to you?

A. (The witness did not answer.)

Q. Did you understand the question, Mr. Kapelski?

A. No.

Q. Now, the "no" is to what—to my question?

A. To your question.

Q. Then I understand you to mean that you did not modify or change your testimony as the result of what Mr. Bradley told you. That is right, isn't it?

A. May I answer that in—the thing is probably on the [fol. 22] very first day, probably, I did not understand some of the questions that were asked me, and I probably was not as frank with them as I should have been. I didn't explain them all as clearly as I should have.

By Judge Maris:

Q. On the first day, Mr. Kapelski, you did not indicate in any way that you were dissatisfied with the services of Herbert Garrison, did you?

A. On the first day?

Q. Your first day's testimony.

A. That is correct. If I recall——

Q. In other words, you withheld that information from the Court, did you not?

A. I withheld that, Your Honor, and I think the following day you asked me all those questions.

Q. And you frankly stated the whole situation?

A. I did, sir.

Q. Undoubtedly so. Now, isn't it a fact that your reticence on the first day was due at least in part to your conversation with Mr. Bradley?

A. It probably could have been in a sense, because I was—well, I don't know—I was more or less——

Q. You were——

A. I was confused.

[fol. 23] Q. You were, as you said, "in the middle."

A. That is right.

Q. You had nothing to do with this case; you were not a party to it; you were just a witness, and you found yourself in a situation which rather puzzled you, didn't it?

A. That is right; I was more than puzzled.

By Mr. McBride:

Q. But you did not lie or attempt to lie as a result of anything Bradley said to you, did you?

A. I did not attempt to lie on anything.

Q. That is right. The first day you simply said you did not fully understand what was asked of you; on the second day in answer to the Court's questions, you did. That is it, isn't it, Mr. Kapelski?

A. That is right.

By Judge Maris:

Q. Of course when you had this talk in the corridor, you had in the back of your mind that you had a contract with Mr. Bradley's union which would be coming up for renewal some time within the next six months or so. You had that in the back of your mind?

A. I probably did.

By Mr. McBride:

Q. Well, you did not understand, did you, Mr. Kapelski, [fol. 24] that what Mr. Bradley said was a threat against you in connection with your contract—did you?

A. (After a pause) At the time when all this was taking place, most anything could have gone through anybody's mind.

Q. I did not ask you that, Mr. Kapelski. You have testified before that you did not consider it to be a threat against you in any way in connection with your contract, did you?

A. I testified that it was not a threat against me, in bodily harm.

Q. And didn't you also testify that you did not consider it to be said against you in a threatening way regarding any contract that your company had with the union?

A. I never recall a question of that nature.

Q. It is a fact, isn't it, that at that time you didn't consider that Bradley was threatening you with respect to some contract that was coming up for possible renewal some time in 1943; isn't that right?

Judge Goodrich: Let us be sure he has the question. Will you read the question?

(The question was read by the reporter as follows:

[fol. 25] "It is a fact, isn't it, that at that time you didn't consider that Bradley was threatening you with respect to some contract that was coming up for possible renewal some time in 1943; isn't that right?"

Mr. McBride: And before you answer, Mr. Kapelski, I also read from the testimony, at page 17, in connection with the previous question——

Mr. Curtin: If Your Honor please, I do not understand. Is there any question pending?

Mr. McBride: There is a question pending, and I asked to read to him what he had said before on that same thing.

Mr. Curtin: I think, if Your Honor please, the proper method would be to have the witness asked the question; then if he doesn't know, give him the notes of testimony to refresh his recollection. I don't think he should ask the question and give him the statement at the same time.

Mr. McBride: You Honor, I ask leave to withdraw that question.

Judge Maris: You may withdraw that.

By Mr. McBride:

[fol. 26] Q. I ask you this question——

Judge Maris: On which day?

Mr. McBride: This is the testimony of Mr. Kapelski on page 17.

Mr. Curtin: Page 17 is on the 15th.

Judge Maris: That is on the first day?

Mr. Curtin: The first day of his testimony.

By Mr. McBride:

Q. Halfway down the page. Did you testify this way:

"He says, 'Well, I am here for the same thing.' He says, 'That is the case I have been fighting.' He says,

'Nevertheless, if you are on their'—he says, 'you are going to get'—in other words, 'you are on the wrong side of the fence, or you are going to get a trimming from the side of the fence you are on.' That is the way the thing implied to me. There was no threat as far as our contract with the union was concerned, but the threat, 'If you stay with that side, you are on the wrong side of the fence.' That is the way I took it."

Now, after reading that to you, Mr. Kapelski, I ask you whether it is a fact that at the time Bradley made this [fol. 27] statement you didn't consider that he was threatening you respecting any contract with the union?

A. (After a pause) No.

Q. Do I understand you to mean that therefore you didn't understand that he did not threaten you with respect to the contract—is that what you understood?

Judge Goodrich: Mr. McBride, I am afraid that is a little complicated. I did not follow the question myself.

Judge Maris: You asked him something which calls for a yes or no, and his answer is "No." That is clear, isn't it?

Mr. McBride: It is clear his answer is "No," sir, but it is not clear to me what he meant by it.

By Judge Maris:

Q. Mr. Kapelski, isn't it really the situation? Is this fair to say—you have told us what words you heard from Mr. Bradley.

A. That is right.

Q. And what he meant by it. Of course, what passed in his mind, you cannot say.

A. I cannot state what was in his mind; that is right. [fol. 28] Q. But at the time you knew that you and he had relations of your own through your company?

A. That is right.

Q. Which might be subject to some action in the future in case either he or you wanted to take it—you knew that at that time?

A. Well, we all hold that feeling, yes.

Q. And you had no interest whatever in this suit that was here pending, and you had no personal interest in the Delaware-New Jersey Ferry Company, did you?

A. No, sir.

Q. It made no difference to you, really, whether they won or lost?

A. No, sir.

Q. I mean you were just an innocent bystander, so to speak, as far as this suit was concerned?

A. That is right, sir.

Q The only thing that really concerns you from day to day is the management and operation of your own company and its future, and anything that may bear on what may happen to your company is a matter of real concern to you, isn't it?

A. That is right.

By Mr. McBride:

[fol. 29] Q. So far as you know, Mr. Bradley had no interest in this suit either; that is right, isn't it, Mr. Kapelski?

A. Not until I met him in the corridor.

Q. And what interest did you find out he had in the suit when you met him in the corridor?

A. Repeat that.

Q. I thought you did not understand it. It is that so far as you know Bradley was not interested in this suit —was not a party to it—so far as you know had no interest in it. That is right?

A. That is right.

Q. Now, when you said before to Judge Maris and to Judge Goodrich that there was no threat as far as the contract with the union was concerned, you were telling the truth then, weren't you?

A. Yes, sir, I was telling the truth.

Q. And that is the fact, and you would so testify now, wouldn't you?

A. I should; yes, sir.

Mr. McBride: That is all.

Redirect examination.

By Mr. Curtin:

Q. Just one or two questions there. Now, you stated, I [fol. 30] believe, in answer to Mr. McBride, that you introduced Mr. Josendale to Mr. Bradley; that is not correct, is it?

A. I didn't state that I introduced him.

Mr. McBride: No.

By Mr. Curtin:

Q. Wasn't there something you were supposed to have said to him about his being connected with the ferry company?

A. I said, "I am up here with Mr. Josendale here in regard to this Herbert Garrison."

Q. That is correct. In other words, he knew Mr. Josendale, probably—you did not introduce him, did you?

A. No, he probably knew him; I would not know.

Q. But you did tell him, did you not, that you were here to testify?

A. That is right.

Q. Now, when you said that you had—that your company had—a contract with the union, that was, I believe, correct, was it not?

A. That is right.

Q. Now, a contract of a company like yours with the union carries with it a lot of different questions of operation and management, does it not?

A. It carries——

Mr. McBride: I object to this leading of the witness, [fol. 31] sir.

Judge Maris: Objection sustained.

By Mr. Curtin:

Q. We will put it this way—what does your contract with the union carry?

Mr. McBride: Objected to as being immaterial, sir.

Mr. Curtin: If Your Honor pleases, I would like you to let me explain because one word has been harped upon—the contract. Now it may mean a lot more in this man's mind—management—different phases——

Judge Maris: I think he has already indicated that.

By Judge Maris:

Q. The fact is that it amounts to a day to day partnership in management, doesn't it?

A. That is right.

Q. If you need a man you have to get him from the union?
A. That is right.
Q. You have to deal back and forth with the union from day to day under your contract, or from time to time?
A. From time to time.
Q. Your relations with the union, therefore, and the [fol. 32] character of them and your relations with the president of the union, are of real importance in your operation, aren't they?
A. That is correct. That is right.
Q. Is that right?
A. That is right.

Mr. Curtin: That is all.

Ludolf A. K. Josendale, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Curtin:

Q. Mr. Josendale, where do you live?
A. Newcastle, Delaware.
Q. And you are employed by whom?
A. Delaware-New Jersey Ferry Company.
Q. The Delaware-New Jersey Ferry Company—they were the respondent, were they not, in the matter of National Labor Relations Board, Petitioner, vs. Delaware-New Jersey Ferry Company, No. 7850?
A. That is right, sir.
Q. Prior to September 14, you were in touch with the [fol. 33] previous witness, Mr. Kapelski, were you not?
A. I was.
Q. Can you tell us whether or not you requested him to appear here in behalf of your company to testify as a witness?
A. I did.
Q. Now, prior to coming up here to testify on September 14th, were you in touch with Mr. Kapelski?
A. I was.
Q. Where?
A. In his office in Chester, Pennsylvania.

Q. Was anybody with you?

A. Yes, our dockmaster, Mr. Sentman, was present.

Q. Mr. Sentman.

A. Sentman, yes.

Q. Did you have a conversation with Mr. Sentman relative to the testimony he would testify to as to this case?

Mr. McBride: Objected to as being improper, having occurred in the absence of the respondent, sir.

Judge Maris: Overruled.

Mr. McBride: An exception.

[fol. 34] The Witness: Why, the conversation was as to the ability of this man that I asked him to testify against, this fellow.

By Mr. Curtin:

Q. What was the name of the man about whose ability you asked him to testify?

A. Herbert Garrison.

Q. What did he say with respect to his ability?

A. Well, he told me he had hired him and he had fired him because he was no good. He didn't do his work, and as far as he was concerned, why, he would never have another job in his company. In fact, he told me he had been up there the previous week, or two weeks—I could not say exactly—and applied for a position, and he had told him he would not hire him under any circumstances.

Q. Now, then, the following Monday——

Mr. McBride: First of all, I move to strike that conversation from the record.

Judge Maris: Motion overruled.

Mr. McBride: Exception.

By Mr. Curtin:

Q. On the following Monday, did you stop in for Mr. [fol. 35] Kapelski and bring him up? That would be September 14th.

A. Monday morning, September 14th, I stopped at Mr. Kapelski's office at Chester, and I drove him up here in my car.

Q. Now, how did you enter this building?

A. We entered the building from the Market Street entrance.

Q. Market Street entrance—that is, you and Mr. Kapelski?

A. Yes, sir.

Q. You came up to the second floor, did you not?

A. Yes, sir.

Q. You proceeded down the second floor corridor?

A. Yes, sir.

Q. Tell us whether or not you met the defendant, Bradley, in the second floor corridor at or near the Circuit Court of Appeals room.

A. We did.

Q. Approximately how far up the building from the entrance?

Judge Maris: Which entrance?

By Mr. Curtin:

Q. From the entrance to the Circuit Court of Appeals [fol. 36] room—approximately.

A. I should say in the vicinity of about fifty yards away from the door, up the corridor—rather far up.

Q. Rather far up—approximately fifty yards?

A. Yes.

Q. Did you have a conversation, the two of you, with Mr. Bradley at that particular time?

A. No, sir; I had no conversation.

Q. Well, sir, did you hear a conversation between Mr. Bradley and anybody else?

A. I did.

Q. Who was the conversation between?

A. Captain Bradley and Mr. Kapelski.

Q. Now, will you relate to the Court what the conversation you overheard consisted of?

A. Why, Mr. Kapelski says, "Hello, there." And, in fact, they both said the same thing in one breath—"What are you doing up here?"

Captain Bradley shook hands with Mr. Kapelski and myself. Mr. Kapelski said, "I am up here with Josendale testifying against this Herbert Garrison."

Captain Bradley says, "That is what I am here for, on this Ferry Company case."

Mr. Kapelski says, "Well, I am testifying against Her-[fol. 37] bert Garrison." He says, "You know, I hired him, and you know I fired him; you know he is no good."

Captain Bradley said, "What do you mean? You are testifying against us."

Mr. Kapelski says, "Well, Mr. Josendale asked me up here and I can't do but tell the truth."

Captain Bradley says, "You are"—he says, "You are going to get a damned good fucking."

Mr. Kapelski says, "Now, wait a minute; wait a minute."

Captain Bradley raised his hand. He says, "The hell with you." He turned around and walked up the corridor.

Mr. Curtin: You may cross-examine.

Cross-examination.

By Mr. McBride:

Q. Mr. Josendale, you say that in that conversation Mr. Bradley said, "You are testifying against us"?

A. "Against us" or "against the other side." Now I cannot recall——

Q. Well, did you testify to that before, Mr. Josendale?

A. "Testifying against us"?

Q. All right, you say Bradley said, "You are testifying [fol. 38] against us." Now I ask you, when you were here before the Court and testified before, did you testify that way?

A. I cannot recall that, sir.

Q. Who have you talked to since you were here and testified the last time?

A. Who have I talked to since?

Q. Yes.

A. What do you mean by that?

Q. Have you talked with anybody respecting the testimony you were to give today?

A. No, sir.

Q. Nobody at all?

A. No, sir.

Q. You did not talk with the United States Attorney, did you?

A. Last Monday I was talking to him; yes, sir.

Q. And you told him what testimony you would give?

A. I presumed he knew what I gave.

Q. I asked you whether you told him what you were going to testify to.

A. No, sir, I did not tell him what I am going——

Q. You did not tell him?

A. No, sir.

Q. Did you tell anybody else what testimony you were [fol. 39] going to give?

A. No, sir.

Q. Did not discuss that with any other lawyer or official of the company?

A. Positively not.

Q. Can you tell us why you did not say that when you testified here before?

A. Didn't I testify to that?

Q. No.

Judge Maris: Say what, Mr. McBride.

Mr. McBride: That Bradley had said, "You are going to testify against us."

By Mr. McBride:

Q. Why didn't you say that when you were here before and testified?

A. May I address the Court, please?

Judge Maris: Yes, certainly.

The Witness: I am not quite sure—now, I want to be sure of this thing—whether Captain Bradley said, "Against us" or "Against the other side." Now, that is something I am not quite sure about. I would not swear to that.

By Mr. McBride:

Q. How long have you been working for the Delaware-[fol. 40] New Jersey Ferry Company?

A. Since 1925.

Q. And what is your position there?

A. Marine superintendent.

Q. And did you handle labor relations matters?

A. I did not. I only handle the engine room personnel—my department.

Q. Mr. Bradley in talking to Mr. Kapelski said what he had to say in your presence, and you heard it; that is right, isn't it?

A. That is right, sir.

Q. Made no attempt to draw him on the side?

A. No, sir.

Q. He shook hands with you and Mr. Kapelski?

A. That is right, sir.

Q. The conversation took only a couple seconds, didn't it?

A. I would say a minute or so.

Mr. McBride: That is all.

Mr. Curtin: That is all. The Government rests.

Government rests.

[fol. 41] MOTION TO DISMISS

Mr. McBride: Will the Court hear argument on a motion to dismiss this charge?

Judge Maris: If you wish to make it, sir.

Mr. McBride: May it please the Court, we move to dismiss the rule, or discharge the rule, on the ground that the Government has not met its burden of proving the guilt of the defendant beyond a reasonable doubt.

First of all, the statement that was made, whatever its purport, was not made in the presence of the Court.

Secondly, we contend, sir, that on the evidence here, it was not made so near to the presence of the Court as to justify the use of the summary jurisdiction of the Court to punish for contempt.

Third, we take the position that since what this Court has the right to punish is a contempt of its authority, at the time any conversation took place this Court's authority was not involved. This man was not subpoenaed as a witness at that time; he was under no duty to be present, to remain here, or to testify until actually called to the stand, and the statute governing the right of this Court to punish for contempt specifically says that this Court's right to [fol. 42] punish is as to the abuse of its authority. Now, irrespective of the question of whether or not what was said amounts to a threat or intimidation such as to justify a criminal charge before a jury, the point that I now make, sir, is that whatever was said is not in defiance to or a contempt of any authority of this Court, because the Court had not acted, nor had anyone called the Court's authority into operation.

Next, sir, the language used is clearly ambiguous, and involves, therefore, interpretation. It is not a question of the use of such language that admits of no other interpreta-

tion; it is not an attempt to bribe; and therefore the Court must look at all the surrounding circumstances, and under all those circumstances the Court can say and be satisfied to a moral certainty beyond a reasonable doubt that this man committed a wilful contempt of this Court. Now, the best way to judge, it seems to me, sir, is that the witness himself did not consider it to be a threat—the equivocal language as to what would happen if the witness testified on that side. The witness has himself said that to him it simply meant he was on the wrong side. I submit, [fol. 43] sir, that the Court does not have to extend its judicial notice very far to know that when one man from the waterfront talks to another, that is exactly what he does mean. I submit that is a matter of general knowledge that there is absolutely no threat contained in language like that. It simply means that you are going to lose, or your side is going to lose, and above everything else that is exactly what the witness thought it meant. And therefore, sir, I say that on this whole record—then coming to the question of whether or not it is near to the Court—in the Savin case, which is the outstanding authority in matters like this—there are two very real distinctions. The first thing is, Savin was under subpoena; he was a witness under subpoena, and the Court's authority was in operation there. Secondly, that Court did not decide that what was done was near to the presence of the Court: it simply decided that what was done there was actually in the presence of the Court because the first attempt to bribe a witness was made in the witness room, which the Supreme Court said was part of the court itself. The Court was present in its own witness room.

The second attempt that was made——

[fol. 44] Judge Maris: That is a little far-fetched, isn't it, Mr. McBride? Because "in the presence" means that the Judge sees it; therefore, he does not have to have evidence or testimony. He sees it himself, with his own eyes, but he did not see through a wall into the witness room.

Mr. McBride: It might be far-fetched, sir, but that is what Judge Harlan said in that case.

Judge Maris: It must mean by "witness room" an anteroom around the court.

Mr. McBride: I presume it does, sir, but I point out that the Savin case had nothing to do with that part of the

statute "so near to," and the Supreme Court said that the only thing that they were deciding was the question of whether or not since it took place in a witness room, and they cite authorities to that proposition, they said that the Court was present in its own witness room and in its own jury room; and they said specifically, "We do not decide whether or not that part of the statute referring to acts done so near to the Court under any condition—the idea of tumult or actual disturbance"—as the Supreme Court has said in the Robinson case. Mr. Justice Roberts specifically [fol. 45] restricted his decision to that.

In the Savin case, first of all, the attempt that was made, was made in the witness room; second, it was in a little hallway, part of the court room itself. It was not a public or general corridor as is here involved. There are two real distinctions: First, subpoena; second, the fact that it took place in a general corridor a hundred yards away or fifty yards away.

Judge Maris: What is the distinction between the little corridor and the public corridor? What distinction do you draw there?

Mr. McBride: I draw the distinction that the Supreme Court drew, sir, that that little corridor was part of the premises set apart for the use of the Court. I have the decision here. I cannot recall the particular language as to that part—they said that that little corridor there was part of the premises set apart for the use of the Court, and therefore the Court was present in that little corridor.

That is precisely what the Supreme Court said—the Court was present in that little corridor. And in no sense would this Court hold that you are present in a general corridor, so that *that* part of the statute does not apply.

[fol. 46] Now, when you come to the use of the language in the statute referring to "near to the presence of the Court," we have the Nye case, which made no distinction not covered already by the subpoena case. They did not say anything in addition to that, and on that fact, of course, the Nye case is distinguished clearly.

Judge Maris: Yes.

Mr. McBride: But in answer they say that it is more than a geographical matter; and when they came to the Robinson case, which says that the "near to" aspect of the statute should of necessity be accompanied by a tumult

or disturbance which actually interfered with the Court, and since that case is quoted with approval in the Nye case, and since the Toledo newspaper case is set aside, it simply rested upon the doctrine of proximate causation rather than geographical contiguity. I say on that ground, and apart from the others, I respectfully submit that this Court ought to halt this proceeding here.

Mr. Curtin: Do you desire argument?

Judge Maris: No, I don't think we need it. The motion is overruled and an exception to the respondent.

[fol. 47] Respondent's Evidence

William V. Bradley, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. McBride:

Q. Mr. Bradley, where do you live?

A. I live at 174 Pelton Avenue, West Brighton, Staten Island.

Q. What is your occupation?

A. I am a resident and business manager of the United Marine Federation Local No. 333.

Q. How long have you been so engaged?

A. Since 1937.

Q. And were you a part in any way to this case of National Labor Relations Board against the Delaware-New Jersey Ferry Company?

A. Only as a witness.

Q. And did you appear here for the purpose of testifying?

A. I did.

Q. How did you come into the building?

A. When I came in on the far end, I believe it is the Mar-
[fol. 48] ket Street end——

Q. Did you see Mr. Kapelski?

A. Well, I didn't see him when I first came in. I was requested to be at the court at ten-thirty and I got here about ten minutes after ten, and I met Mr. Somers, of the National Labor Relations Board, just outside the court

room, and I needed a shave, and I asked him if I would have time to go down and get a shave.

Q. What time did you start after your shave?

A. Well, it was around ten minutes after ten, because he said, "Can you be back here in fifteen minutes?"

And I says I thought I could, and he had a little envelope that he was going to mail, and he said, "Will you drop this in the box for me?"

And I said, "Yes."

So he says, "Well, be back in fifteen minutes."

So I started out, and when I got on the forward end, I was just going around to get the elevator, and I heard someone call me, and it was Mr. Kapelski, and he says, "Good morning, Cap, what are you doing here?"

I said, "Good morning, Mr. Kapelski." And with that [fol. 49] I shook hands with him, and the gentleman with him was—which was Mr. Josendale—and I says, "I am here on the—witness for the National Labor Relations Board." I says, "What are you doing here?"

He says, "I am here against Herbert Garrison."

And I says, "You are?"—something along that lines—I says, "Are you appearing against the Garrisons?" I said, "Which one?" He says, "The Garrison that worked on the boats."

And I says, "Oh," I says, "yeah?"

And he says, "Yeah."

I says, "Well,"—I says, "you are going to get a fucking," and I walked away from him.

And he says, "Wait a minute."

I says, "I have to be back in fifteen minutes," I kept walking away, and I walked around and took the elevator out.

Q. Now, when you said that, what did you mean?

A. Well, I—I didn't mean in any way to threaten the man. It is just an expression that we have on the waterfront, and I just use it a lot, and I know it isn't right, but the type of men that we are on the waterfront, and the type of men that I deal with, why, it is just a common occurrence and something that just comes out of us with-[fol. 50] out thinking what——

Q. Did you intend to threaten him personally?

A. I did not. I had——

Q. Pardon me; go ahead.

A. I had nothing to gain whatsoever by threatening Mr. Kapelski or the contract. The contract is in effect, and when we make a contract we do everything we can to live up to it, and there is absolutely nothing——

By Judge Maris:

Q. Mr. Bradley, you know that Mr. Kapelski was not interested in this case here, don't you? How would the result in this case hurt him in any way?

A. I didn't think it could hurt him, Your Honor.

Q. What did you mean by making a statement to him which I understood you to mean he would get a good licking? How would he get a good licking out of this case, in other words?

A. When I says "you" I meant "the other side," Your Honor.

Q. I see.

A. I just—as I say, it is an expression that we have on boat, and being president and manager of the organization——

Q. Well, not making any special reference to him, what [fol. 51] I gathered is that what you meant was that somebody was going to get a damned good licking. Isn't that what you meant?

A. Yes.

Q. In this law suit?

A. Yes, Your Honor. I figured we had a good case in court.

Q. But you knew Mr. Kapelski was not interested.

A. No.

Q. Neither he nor his ferry company are in this law suit.

A. No, I knew that.

Q. And it would not hurt him any if the company lost everything it wanted to get.

A. Absolutely.

By Mr. McBride:

Q. Did you have any interest in the law suit?

A. No, none whatsoever.

Q. When you said "you," did you mean Mr. Kapelski personally?

A. I mean just as I said, we were going to beat them in the case. I did not mean him personally, or anybody personally; I just figured we had a good case in court.

By Judge Maris:

[fol. 52] Q. You say, Mr. Bradley, you have no interest—you were president of a union whose members had a very real interest, didn't they?

A. Yes, but the reason I say that——

Q. I mean they were in here—if they won they would have received large amounts of back pay as members of your union.

A. Yes, Your Honor, but they would have won by it.

Q. And among those would have been Herbert Garrison?

A. Yes, sir.

By Mr. McBride:

Q. Would he? Was he a member of your union at this time?

A. No, he is not.

Q. Tell that to the Court. What interest did you have in Herbert Garrison at this time?

A. I had no particular interest as far as myself or the organization, but I felt as though he had something coming, and the reason I say I had nothing to gain by threatening Mr. Kapelski was that I believed the Court had ruled in the case of the National Labor Relations Board that that set-up of the union as far as the licensed men and un-[fol. 53] licensed men was the wrong set-up, and we have Mr. Kapelski's company under that set-up, and we are getting in his company and also in the South Street—Jersey—company wages and conditions way above the Pennsville ferry. That is the reason I say I had nothing in threatening of him; it was just an off-handed remark that we boys in New York a lot of times—or anywheres on the water front——

Q. Let me ask this: Did you mean any disrespect whatever to this Court?

A. Absolutely not any.

Q. How many times have you ever been in court?

A. This is the second time in my life I have ever been in court.

Q. Have you ever been arrested or anything like that for any crime?

A. No, sir; no, sir; I have never been arrested, outside of an automobile violation.

Q. Were you attempting to dissuade Mr. Kapelski from testifying?

A. No, sir, I was not, because it didn't make any difference to me personally, or to the organization, how Mr. Kapelski—as a matter of fact, he would have put me or my organization in a better position if he did testify against Garrison.

[fol. 54] Q. Why?

A. Well, it is an argument—not only—it is an argument we have with all companies on a competitive basis: when we go in to make our contracts—the Pennsville and New Castle is somewhat of a competitor of the company, and, as I said before, we are getting wages way above those wages down there, and I had absolutely nothing——

Q. Let me ask you this: Do you mean if the decision had been against Garrison that would have helped the union out and facilitated its dealings with your employers?

A. I say as far as the Bridgeport-Chester run would be, yes, if Mr. Kapelski testified against Garrison, the way I look at it. It——

Q. Now, why is that? Will you explain that to the Court?

A. Well, as I said before, when we go into a contract, all companies—or all concessions by us in regard to wages are on what their competitor is paying, and if Mr. Kapelski was to testify against Garrison, then I would always be in a position to say to him at the negotiations, "Well, we tried to do something in Pennsville, and you hindered us; [fol. 55] you stopped us from doing that." I mean that is the argument we would have always had with them.

Q. You mean this is something you thought up in the preparation of this case: that was not in your mind at that time, was it?

A. No, but there was no threat in my mind either. I did not even know Mr. Kapelski was here, and I would not have known it if he had not stopped me.

Cross-examination.

By Mr. Curtin:

Q. Your union is 233, Mr. Bradley?

A. 333.

Q. 333—your union did not have a contract with the Delaware-New Jersey, did it?

A. No, sir, it did not.

Q. And you were negotiating for a contract, were you not?

A. At this time?

Q. No, at the time of this occurrence.

A. Negotiating with——

Q. Negotiating with the Delaware-New Jersey Company? Weren't you trying to sign them up for a contract with your union, Local 333?

A. No, sir; not at this time.

[fol. 56] Q. I am talking about the time that all this action took place, when the case was heard—labor case and everything—you were not trying to have a contract with them?

A. No, sir.

Judge Goodrich: I don't think the question is clear. Do you mean two weeks ago or several months ago? I don't quite get the point.

By Mr. Curtin:

Q. At any time prior to the hearing of this case when you met Mr. Kepelski, wasn't your union Number 333 trying to enter into a contract with the Delaware-New Jersey?

A. We haven't contacted on our contract since, I think it was, April 17, 1940.

Q. In other words, prior to this trial you had been trying to sign them up, naturally, hadn't you?

A. Not since the National Labor Relations Board had taken the companies over, no.

Q. Now, Garrison was not a member of the union, was he?

A. No, sir, he was not.

Q. Were these other men members?

A. At this time they wasn't, no.

Q. Was Garrison a member at the time you went on [fol. 57] strike, however?

A. He was, yes.

Q. In other words, he was a member at the time you went on strike, but he is not a member now?

A. That is right.

Q. These other employes involved—were they members of your union?

A. At the time they went on strike, yes.

Q. At the time of the strike, they were all members of the union?

A. At the time they went on strike, yes.

Q. So in the award of pay by the National Labor Relations Board in this court, your union would have vital interest?

A. No, it would not, not at this time.

Q. Wouldn't your union have an interest in its members and former members that went out on strike securing large amounts of money for back pay?

A. Yes, but the union and myself would not benefit as far as that particular company was concerned.

Q. Yes, but I mean you would notify all the people that worked along the river that your union was instrumental in securing these large amounts of money, wouldn't [fol. 58] you?

Mr. McBride: Objected to. It shows no union interest. It is purely speculative.

Mr. Curtin: He says his union had no interest whatsoever.

Judge Maris: Objection overruled.

By Mr. Curtin:

Q. Did these men owe you any back dues? Had they been dropped for nonpayment of dues, in other words?

A. Your Honor, we stopped collecting dues from these members pending the National Labor Relations Board ruling. Now, the National Labor Board ruling, as I understand it, and my advice was, that they took it to—I don't know just what court, but nevertheless the court ruled that the licensed personnel and the unlicensed personnel was the wrong set-up in that particular company.

Judge Maris: Yes, we are familiar with that.

The Witness: And we in the organization have all of the New York Harbor, Providence, and all along the coast organized under that set-up, and we talked it over, and the Executive Board had talked the ruling of the courts over, [fol. 59] and thought it best that we do what we could to get these men their back pay, and then we could not put them in the union under the set-up that we have now, due to the ruling of the court, and that is the only reason we wasn't interested in them, because for that reason——

By Mr. Curtin:

Q. Now, this expression that you used—we won't go into it—you know what it was: that has quite a few meanings, does it not?

A. Yes, but—I say, Your Honor, but when we use it, it is just as I said, an offhanded remark.

Q. In other words, it can mean that you are going to lose something, either of a financial nature, or of a physical nature: in other words, it has three or four different meanings, doesn't it?

A. Well, I believe it could be interpreted that way.

Q. That is right. That is what I am getting at.

Mr. McBride: Just a minute; let him finish.

Mr. Curtin: I am not stopping him. Go ahead.

The Witness: But after all it is more or less a remark that is passed by us men of the waterfront.

By Mr. Curtin:

Q. But even with men along the waterfront, it has been [fol. 60] construed to be a threat, has it not?

A. Not that I know of, no.

Q. In other words, your interpretation—go ahead.

A. It is the same—if you were going along the waterfront, and we will take, for instance, the World Series game now—now, if you walked aboard a tugboat at Pier 1 North River, and you say to some guy something about the Brooklyn Dodgers, he might say a thing like that about the Brooklyn Dodgers. I don't know why it is, but it is a remark that we just can't get away from.

Q. That is right; that is one shade—we will go to some of the other shades: It can mean also that you are going to get a good licking, can't it?

A. I never heard it that way.

Q. You never heard it used in that fashion?

A. No, sir, I did not.

Q. We will go to the thing between—the middle one: you never heard it used in the financial sense, meaning the loss of something financially by it—either you or the people connected with you?

A. Well, I never used it, or I don't know of anybody that would use it.

Q. In other words, the only meaning you have heard is the one you have said?

[fol. 61] A. That is the only time I use it, yes.

Judge Maris: Anything further?

Mr. McBride: No, that is all.

Judge Maris: All right.

FREDERICK A. RUSSELL, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. McBride:

Q. Where do you live?

A. I live in New Canaan, Connecticut.

Q. Are you personally connected with the armed services?

A. No, I am not.

Q. Do you know the respondent, Mr. Bradley?

A. I do.

Q. How long have you known him?

A. Oh, five or six years.

Q. Have you done any business with him in connection with the tugboat work?

A. I have.

Q. Does your company have a contract with him?

A. Yes, it has. I happen to be chairman of the New York Harbor Arbitration Board which negotiates the agreements [fol. 62] with Captain Bradley's union.

Q. Now, you, therefore, know a large number of people who know Captain Bradley?

Mr. Curtin: Excuse me, please: Is this just a character witness? I am at loss. I would like to ask at side bar for an offer of proof. I am at loss as to the proper time to object. I don't want to object to each question.

Judge Maris: Perhaps he may develop the testimony, and if it becomes objectionable, in your view, you may raise objection.

By Mr. McBride:

Q. Mr. Russell, you say that you have negotiated with Mr. Bradley in the capacity you mentioned: do you know a large number of people who know him?

A. Yes, I do.

Q. Among those people what is his reputation as to being a good, decent, law-abiding citizen?

A. Yes, he is.

Q. What is his reputation as being a citizen who respects the institution—American institution such as courts?

Mr. Curtin: Now just a moment. That does not come in character witnesses.

[fol. 63] Mr. McBride: It is the very trait of character involved in this criminal prosecution, sir.

Mr. Curtin: I submit it does not come under character.

Judge Maris: Objection overruled. If he knows—if this has been discussed.

Mr. McBride: Does Your Honor say it must have been discussed?

Judge Maris: Well, how can he tell what his reputation is unless he has heard it bruited about to some extent?

Mr. McBride: Well, that may affect the weight of his testimony, but if he has seen this man, and seen others talking with him, and had dealings whereby they made contracts which they lived up to, and in general did not violate the law and so forth, even though it be that negative——

Judge Maris: That you have asked him, but you are going to a specific question as to whether he respects the court.

Mr. McBride: Yes, sir.

By Mr. McBride:

Q. First of all, do you know anything about Mr. Bradley's reputation as a citizen who has respect for the courts [fol. 64] of the country?

A. I consider him a very respectful, law-abiding citizen and a man that lives up to his verbal agreements as well as his written ones.

Mr. McBride: Cross-examine.

Mr. Curtin: I have no questions.

Mr. McBride: That is all, Mr. Russell.

Judge Maris: That is all.

Respondent Rests

Mr. Curtin: I have no rebuttal, sir.

Judge Maris: The court will take a recess for a few minutes.

(Recess from 11:53 until 12:43 P. M.)

Judge Maris: Gentlemen, the Court has considered this matter and has prepared an order which I shall read and hand to the clerk.

(Judge Maris then read the following:)

ORDER AND JUDGMENT

And Now, September 28, 1942 after full hearing and consideration of the testimony in open court upon the return of the rule to show cause heretofore entered herein the court [fol. 65] now finds that

On September 14, 1942 at about 10:15 o'clock A. M. and about fifteen minutes before the scheduled commencement of the hearing by this court of a certain proceeding pending in this court entitled National Labor Relations Board v. Delaware—New Jersey Ferry Company, No. 7850, in the corridor of the United States Courthouse outside of and adjoining the court room of this court in Philadelphia, the respondent above named, William V. Bradley, did utter words which were calculated to and intended to intimidate one Louis Kapelski, a prospective witness then and there voluntarily attending the opening of this court for the purpose of giving testimony in the above mentioned cause on behalf of the respondent therein.

The court further finds that the words so uttered by the respondent Bradley did intimidate the said Louis Kapelski to the effect that he gave before this court false, perjured and incomplete testimony upon the hearing of the said cause.

From the foregoing facts it is adjudged by the court that the respondent William V. Bradley did thereby commit a [fol. 66] contempt of this court for which contempt it is by the court now ordered and adjudged that the said William V. Bradley be imprisoned for the period of six months and pay a fine of $500.00 and stand committed until the sentence is complied with.

It is further ordered that the United States Marshal for the Eastern District of Pennsylvania shall forthwith execute this judgment.

APPLICATION FOR BAIL, ETC.

Mr. McBride: May it please the Court——

Judge Maris: Mr. McBride.

Mr. McBride: I would like an opportunity to take such

appeal, or writ of error, or such other legal proceedings as are warranted in the premises, and I would therefore ask the Court if it will fix bail so that I might have such opportunity. I think it is a very serious matter. It has implications other than those of this respondent, and is the kind of case that ought to be reviewed.

Judge Maris: Specifically, what is your application, Mr. McBride?

Mr. McBride: My application, sir, is to have continued the bail to act as a supersedeas so that the defendant need [fol. 67] not now commence the service of the sentence imposed, and that that supersedeas last until disposition of any further appeal from the sentence and judgment of the Court.

(The Judges confer.)

Judge Maris: I suppose any application that would be made, would be made to the Supreme Court.

Mr. McBride: I believe so, sir.

Judge Maris: Now, should not your application be addressed to the Supreme Court or a Justice thereof?

Mr. McBride: I think it should be first addressed to Your Honors, and because of the fact that we start here with the second highest court in the land, it perhaps, I think, would be better, certainly from our point of view, if it were granted by this Court. If we started in the District Court, we would have a Circuit Court to whom we could go.

Judge Goodrich: Don't you think our situation is comparable, so that our position in this is something like that of the District Court judge, and then an application is made to the Circuit Court of Appeals to admit to bail if the District Court judge denies the motion?

[fol. 68] Mr. Curtin: That is correct, sir.

Mr. McBride: I think it is comparable, with one exception, that in balancing the conveniences it is heavily weighed on the side of this respondent. After all, sir, this is a summary proceeding: it is a case in which the Court issued its own rule.

Judge Goodrich: That goes to a different point. Are we all agreed that the situation is comparable to that of application to a District Court judge for bail after conviction?

Mr. Curtin: That is correct.

Mr. McBride: I do not know, sir. I do not know that this court is in the same position as the District Court judge would be. I think this is, of course, sir, utterly within the Court's discretion as to whether it will grant it, and I know of no guide by which that discretion should be measured or ruled. I submit; sir, that the only guide should be—the question going directly from this court and going directly to the Supreme Court of the United States would take such a considerable amount of time that before ultimate decision the question may be moot.

Judge Maris: Well, you are in a fortunate position in [fol. 69] that the Supreme Court will meet next Monday. In other words, any application you make will be considered no doubt very promptly by that court.

Mr. McBride: Well, it may be, sir, but there is a big distinction between getting a Circuit Court to pass upon the probable cause, and the way in which a District Court is involved, as compared to the way in which you have to prepare you certiorari and have it printed in an appeal from the Circuit Court to the United States Supreme Court. I urge upon Your Honor that it is the understanding that competent dispatch would be used and that no supersedeas would be or should be used for the purpose of simply delaying the court's judgment, and we would make the application immediately, sir; but inasmuch as this is a summary proceeding, I submit that the questions are serious, and the consequences to the defendant are serious, and it raises a fundamental question of law.

Judge Maris: What is the question that you seek to raise?

Mr. McBride: I seek to raise first, sir, that this court is without power to impose the suminary judgment of sentence against this respondent for an act which was done a [fol. 70] hundred yards away from the court at a time when the court was not in session, and particularly where the act was done, and the language was used, to a man who was not yet a witness, who was not under a subpoena or authority of this court, and by the use of language which was at the very worst ambiguous.

And further, I raise the question that on the whole record this court could not find that this man did so intend to intimidate beyond a reasonable doubt, as is necessary even under this court's own decision in the Eskay case as well

as the Michaelson case in the Supreme Court of the United States. But if it is a criminal proceeding, he is being summarily adjudged in contempt, and being put in jail, and if he does not have a supersedeas, irreparable injury may be done.

(The Judges confer.)

Mr. McBride: May I add one further fact that I have not mentioned? He has never been arrested before, and he has a wife and four children; and on that ground I hope the Court will see fit to grant the motion.

Judge Maris: I should think, Mr. McBride, it would be [fol. 71] extremely doubtful whether we would have any basis for enlarging this defendant unless an application for some kind of review has been made. That certainly is true in the case of the District Court—you have got to take your appeal to the Circuit Court of Appeals before you can make application for bail in a supersedeas. I mean supersedeas simply won't be granted on conversation——

Mr. McBride: May I suggest this, sir, that Your Honor could grant the supersedeas, one of the conditions to be that within a specified time the application be made, and certainly that would be quite proper in view of the difficulties attendant upon actually making the application. It would not be mere conversation if Your Honor should grant the supersedeas conditioned first that we make the proper application within the time specified by the court; otherwise he has to go to jail; secondly, that we prosecute the application diligently and properly. It seems to me that justice would be well protected in that.

Mr. Curtin: Does Your Honor care to hear from me?

Judge Maris: Yes.

[fol. 72] Mr. Curtin: I do not want to discriminate either way—in favor of or against it, but before this is completed, I submit that this court is without jurisdiction presently to entertain a writ of supersedeas when there is no docket in the appellate court. The same thing applies in the District Court—after judgment has been denied, there must be a docket in the Circuit Court of Appeals before we can go in there. I must agree with what Judge Maris has said, that in all fairness I do not see how you could.

Mr. McBride: That has been the practice, sir, but it is undoubtedly the fact that this court has control of its

own judgment until the end of the term; you can rest your judgment.

Judge Maris: We are here entering judgment.

Mr. McBride: Yes, sir, but once you enter it—we could not take appeal till you entered the judgment——

Judge Maris: That is right.

Mr. McBride: —and having entered it, you can suspend it upon conditions which you impose, one of them being at a time to be fixed that this application must be made for [fol. 73] review. It seems to me your right to do that is clear.

Judge Maris: Of course, Mr. McBride, you can make an application, I assume,—I think the rules provide for it—to a justice of the Supreme Court. You would as soon as you have taken some step toward getting the case into that court. You do not have to await the determination of your petition for certiorari, sir.

Mr. McBride: Well, I am asking for a special supersedeas or something like that, but it seems to me, sir, that vindication of the authority of this court is the important thing here. It is not a question of whether he spends six months in jail; it is a question of the court's proper care and concern that there shall be no contempts of its authority, and certainly if we test that case and he remains out on bail, and this court grants it, this court certainly has authority to stay the enforcement of its own orders—certainly during the term of the court, could do it. As I say, if it were simply a matter between the District Court and this court where we could go in and file a typewritten petition and go on in a couple of hours—it is an entirely different [fol. 74] matter when we have to see a justice of the Supreme Court and file typewritten petitions for certiorari. As a matter of fact, we may not have the testimony for two or three days or something like that.

Judge Maris: Still it seems to me—I know of no formal rule which requires it—you have to show a substantial question in your argument. I have not yet heard anything that appeals to me as a substantial question of law.

Mr. McBride: May I briefly argue what I think it is?

Judge Maris: Yes.

Mr. McBride: Of course, it seems to be without doubt that the burden is upon the Government to prove his guilt beyond a reasonable doubt. I mean Your Honors concede that—I can assume that that is so.

Judge Maris: I would say that that is so.

Mr. McBride: This Court said so—Your Honors said in Judge Clark's case, the Eskay case, that being so the testimony that has been produced before this Court is testimony of the use of ambiguous language. Now, the Supreme Court has itself said that where ambiguous lan-
[fol. 75] guage is used, the determining factor is the intent with which it was used. Now you have both—the respondent Bradley denying that there was any intent to intimidate, and you have the witness himself saying that the meaning he took from it was not such as——

Judge Maris: Well, I am not sure that he said any such thing, Mr. McBride—and we have also before us, necessarily, because we sat in the case, the effect upon him, and it was quite obvious to the Court that he was under intimidation——

Mr. McBride: You mean Your Honor has applied the judgment——

Judge Maris: —and still is to some extent.

Mr. McBride: Well, can Your Honor say this—oh, "to some extent"—well, I respectfully submit to Your Honor that the only thing Mr. Kapelski is afraid of is this Court. I think Your Honor would gather when he was testifying, to any question Your Honor asked him he was only too willing to reply promptly; he did not take any time thinking as to what his answer would be when Your Honor asked the question. I think that any hesitation was not because
[fol. 76] he was afraid of us, but was deferring to the Court.

Judge Maris: It may be.

Mr. McBride: Now, when you take Bradley——

Judge Maris: You, of course, were not here at the hearing in the other case.

Mr. McBride: No, sir; and may I say this to Your Honor, in this proceeding here you cannot take into consideration any effect that was made upon Your Honor's mind by what you then observed.

Judge Goodrich: No, but I take it we can, because the record has been produced, see what the witness said on various occasions as we go along.

Mr. McBride: Yes, sir.

Judge Goodrich: That is in the record.

Judge Maris: I am not so sure about the other thing: it seems to be a very idealistic view——

Mr. McBride: Let me persuade you on that——

Judge Maris: —that the Court in protecting its integrity cannot take notice of what occurs in its presence.

Mr. McBride: It can take notice of what occurred in its presence—that is, if this thing had occurred in the presence [fol. 77] of the Court, the Court could without any hearing whatever decide it.

Judge Maris: What I referred to happened in the presence of the Court.

Mr. McBride: Yes, but the Court is considering what happened in its presence in connection with a matter in which it has no jurisdiction, and deciding on that matter. You are deciding this on the basis of testimony.

Judge Maris: That is right.

Mr. McBride: This is the first time that this party is a party to the proceeding before the Court, and this Court could no more take into consideration what it knew to have happened then, than what it saw on a day fifteen years ago.

Judge Goodrich: I am inclined to think you are right on that.

Judge Maris: You may well be right on that.

Judge Goodrich: But of course the record shows what he did say.

Mr. McBride: Yes, sir, and the conjectures, such as they are—the witness on the first appearance in this court stated that he would not be able to say that Garrison was unfit, [fol. 78] that he did not fire him for that purpose, and he was very reluctant, and he once said, "Well, you have got me on a spot here;" then when he came back, in answer to Your Honor's questions, he said that he had adjudged that Garrison was not a fit workman, and he told the reason why he had fired him.

Now, when you take that into consideration, Bradley had no interest in that. Whatever discrepancy existed there may have been the kind of discrepancy which existed with reference to any witness's testimony. You had a discrepancy here today when Josendale in reporting the conversation said that Kapelski told Bradley that he was going to testify against Garrison because he had fired Garrison. Now, Kapelski, in telling the whole conversation, does not put that in at all. That kind of discrepancy may occur in relation to any witness's statement.

Now, when you have a specific denial from the Government's own witness, Kapelski—he said, "Whatever Bradley said to me did not cause me to modify my testimony; did not cause me to tell any lie; and did not affect my testimony."

Now, when he says that, that is the Government's own testimony, and can Your Honors really find the contrary [fol. 79] beyond a reasonable doubt simply because of the fact that he did vary his testimony, when there were so many other possible interpretations consistent with innocence?

Judge Maris: That is a fact finding that we may say we were satisfied was right.

Mr. McBride: Does Your Honor feel there was sufficient evidence—of course, Your Honor wouldn't render judgment if you did not feel there was evidence.

The Court: We have no interest in it ourselves.

Mr. McBride: There is a substantial question as to whether that evidence is sufficient; secondly, I would like to repeat this—this man was not under subpoena of this court. Now, the statute talks about misbehavior and talks about the things for which a defendant could be indicted and tried before a jury, but the essential element of the Court's power to punish for contempt is to have a contempt of its authority. Now, the Court had no authority whatever over Kapelski; the Court's authority had not been in this case at all; the Court was not even in session when this happened.

[fol. 80] Now, consider it as being highly improper, consider it as being a threat, consider it as being intimidation—actual intimidation—still the authority of this Court was not held in contempt thereby. Even though he could be indicted, there was no power of the Court in the premises, or any authority of the Court that he had violated. If he were under subpoena as the witness in the Savin case, and he had by intimidation caused that man to violate an order of the Court to appear, then he would be clearly contemptuous of the Court's authority. I think that is an entirely different situation.

Furthermore, the question that it happened a hundred fifty or a hundred yards or so away from this court, when the only relevant decision, the Savin case, in which a man committed a contempt right in the witness room, and right

in a little hallway which was part of the premises set aside for the use of the court—this happened in a public place. Under that and under the Nye decision I think it could not be said this is a substantial violation of the Court's authority.

On the whole case, in view of the summary conviction of this man, who has these four children, certainly it cannot be [fol. 81] said that this Court would be abusing its discretion if for the purpose of permitting a man to test his legal right, the review of the summary judgment of the Court itself was conditioned upon his taking the review promptly, you permit the superseding of the service of sentence imposed by the Court.

I urge Your Honors to do it.

(The Judges confer.)

Judge Maris: Have you anything to say?

Mr. Curtin: The only think I have to say, from my point of view I do not think there is any question of any doubt at all involved in the matter.

Judge Maris: You do not need to argue that.

The Court denies the application. The Marshal will take the respondent in custody.

Court is adjourned.

(Court was adjourned at 12:56 P. M.)

[fol. 82] (The testimony of Louis Kapelski in the matter of National Labor Relations Board, Petitioner, vs. Delaware-New Jersey Ferry Company, Respondent, follows.

The testimony of September 15, 1942, appears at page 83.

The testimony of September 16, 1942, appears at page 106.)

[fol. 83] (Testimony of September 15, 1942.)

"Louis Kapelski, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Wolff:

Q. Mr. Kapelski, are you connected in any way with the Delaware River Ferry Company?

A. Yes, sir.

Q. As what?

A. General manager.

Q. And you are in the court room here today under a subpoena which was served on you last night?

A. That is right.

Q. And you were here voluntarily yesterday morning?

A. Yes, sir.

Q. You drove up? Did you drive up from Chester with Mr. McAndrew?

A. I did.

Q. Of the Delaware-New Jersey Ferry Company, or with Mr. Josendale, was it?

A. That is right.

Q. And you had previously told the officers of the ferry company that would come up here and testify in connection with Herbert Garrison?

[fol. 84] A. Not necessarily.

Q. Well, you came up here as a spectator or with the intention of being a visitor—which was it?

A. I came up here at the request of Mr. Josendale, who was at my office early yesterday morning and wanted to know——

Q. You want us to understand——

Judge Maris: Let him finish. "Wanted to know" what?

The Witness: He wanted to know if I would come up and testify. I said I would be willing to, provided it did not involve us in any way, shape, or form, and that I could be away from there and back in my office by eleven a. m.

By Mr. Wolff:

Q. Now, you did come up here, then, with Mr. Josendale, with the intention of testifying in the case?

A. Under the promise that he would have me returned to the office——

Q. Now, when you arrived here, did you have a conversation in the corridor with Captain Bradley, of the union?

A. I did.

[fol. 85] Q. And your company has recognized Captain Bradley's union?

A. We have.

Q. And that is the United Marine Division, Local Number 333, I believe, is it not?

A. That is correct.

Q. Well, now, you had a conversation with Captain Bradley, didn't you, out in the corridor?

A. Passing conversation.

Q. Yes; and after you had that conversation with Captain Bradley you stated to Mr. Josendale and Mr. McAndrew what Captain Bradley had said to you, didn't you?

A. I did not state that; Mr. Josendale was standing alongside and heard it.

Q. And he heard the conversation, did he? You tell the Court just exactly what that conversation was.

Mr. Somers: I object to that. There is no foundation here. He has not procured anything directly bearing upon the case from the witness, and I do not know whether at [fol. 86] this stage the answer to the question is relevant or proper from the witness. It may be that he can get everything he wants from the witness without this. If he wants to impeach his own witness, that is another matter, but I think at this stage the matter is without foundation.

Judge Maris: I think it is perhaps appropriate to make an offer of proof.

Mr. Wolff: As I said yesterday, if Your Honor pleases, I am going to impeach the credibility of Captain Bradley as a witness, Your Honor. A great many things that Captain Bradley testified to are going to be denied, and Your Honor will be confronted with the question of veracity between opposing witnesses, and in determining that I take it you will have to take into consideration everything——

Judge Maris: Captain Bradley admitted a conversation with this witness and went into some detail. If you purpose to prove that is not what he said——

Mr. Wolff: What he said is correct as far as it went, but [fol. 87] it is a matter that is very distasteful to me and I don't want to go into it.

Judge Maris: I am just wondering. If any purpose will be served, the Court wants it.

Mr. Wolff: The purpose is simply this—this witness was intimidated and went home.

Mr. Somers: I think the witness's own statement would indicate to the contrary. In any event, wouldn't the rule on collateral pleading apply to that—that where a collateral question, that is, collateral to the main issue, is asked the witness in the case, that he is bound by what the witness has stated?

Judge Goodrich: I was thinking of that. Of course, that is true as far as collateral witnesses; however, if the suggestion is made that this witness has been intimidated, it goes further than that.

Mr. Somers: That would apply if he wants to impeach his own witness in the testimony bearing on the issues of the case. I suppose under those circumstances, contradicting your witness——

Mr. Wolff: I am contradicting your witness.

[fol. 88] Judge Goodrich: Suppose we had testimony showing that one of the witnesses for this side is endeavoring to intimidate witnesses for the other side? Would that help?

Mr. Somers: I imagine it would be relevant to account for the nonproduction of a witness whom you were relying on, or for testimony which surprises you—testimony contrary to what you expected of the witness. Under those circumstances it probably would be proper to show the situation in which the witness comes to testify in a manner contrary to what counsel had expected of him. I am sure it would not be relevant at this stage because thus far it does not appear in connection with what this witness was supposed to testify—what is the substantive isssue in connection with which he was supposed to testify? If the witness in the end does not come across with testimony exactly in the manner counsel had expected of him, then that becomes not relevant to this proceeding. This is not a conflict between the union and the company; this is a case in which the Board claims that the company has failed to [fol. 89] perform certain acts.

Judge Maris: It seems to me, just thinking about it, an application for some punishment—perhaps contempt proceedings against a person who was attempting to intimidate——

Mr. Wolff: May I say a word, if Your Honor please? I don't know what this witness is going to say. I am prepared to show what he did say to various witnesses. Whether he is going to confirm that, I do not know; but it is possible that I may plead surprise before I get through with this witness and ask leave to cross-examine him.

Judge Maris: Would it not be more appropriate to proceed with your main examination of the witness directed to the testimony in this proceeding?

Mr. Wolff: But, don't you see, Your Honor, I am employing the witness for a two-fold purpose: first of all, as to

whether or not if the statement was improper and made with an ulterior purpose; and also I am calling this witness to prove something in connection with Herbert Garrison.

[fol. 90] Mr. Somers: I assumed that is what he was there for. He can proceed with that line of proof.

Mr. Wolff: We are not before a jury.

Judge Maris: I will overrule the objection. You may proceed.

The question, in effect, was, What did Captain Bradley say to you yesterday morning in the corridor?

Mr. Wolff: Let me rephrase it.

By Mr. Wolff:

Q. When you saw Captain Bradley out here, did you tell him why you were here?

Mr. Somers: I object to the question—and if he desires to go into the whole conversation he may as well ask him the entire conversation.

By Mr. Wolff:

Q. I will put the question this way: State the entire conversation that took place between you and Captain Bradley.

A. Your Honor, I don't know—it appears as if I am being put on the spot here for some unknown reason.

[fol. 91] Judge Maris: No, I don't think so. I think that you are under full protection of the Court.

The Witness: I met Captain Bradley in the corridor, and naturally I said, "Good morning, Captain Bradley; what are you doing here?"

He answered with the same question—he says, "What are you doing here?"

I said, "I came up here at the request of Mr. Josendale for Herbert Garrison he employed then."

"Well," he says, "you are on the other side, then; you are staying with them."

I said, "Well, I don't know what you mean."

He says, "Well, I am here for the same thing." He says, "That is the case I have been fighting." He says, "Nevertheless, if you are on their"—he says, "you are going to get"— in other words, "you are on the wrong side of the fence, or you are going to get a trimming from the

side of the fence you are on." That is the way the thing implied to me. There was no threat as far as our contract [fol. 92] with the union was concerned, but the threat, "If you stay with that side, you are on the wrong side of the fence." That is the way I took it.

And naturally, being brought up here and stated that I would be delivered back to my office at a certain time, I hung around here, and it was one-thirty before the car arrived here for me to leave here to go back to my office. I was to be back at eleven o'clock.

By Mr. Wolff:

Q. What time did you leave the corridor out here?

A. What time did I leave the corridor? I was there in the corridor until eleven-thirty. I sat on the bench in the midway there reading the Philadelphia Record.

Q. And you were not in the court room either?

A. I was not in the court room; I stayed in the corridor by myself reading the Record.

Q. Did you say anything to Captain Garrison this morning when he arrived here?

A. Did I say anything to him?

Q. Yes; did you have any conversation with Captain [fol. 93] Garrison when he arrived in the court room this morning?

A. Yes, I had a conversation with him.

Q. What did you say to Captain Garrison this morning?

Mr. Somers: I object to that as entirely irrelevant and improper.

Judge Maris: What is the purpose of that?

Mr. Wolff: All linked up with what he has just said, if Your Honor please, for the purpose of proving exactly why he left yesterday.

Mr. Somers: I would still think it immaterial. The witness is here.

Judge Maris: Objection sustained. Proceed.

By Mr. Wolff:

Q. Now, what did you say to Captain Garrison?

Judge Maris: I sustained the objection.

Mr. Wolff: Oh, I beg your pardon.

By Mr. Wolff:

Q. Well, now, Mr. Kapelski, did you have Herbert Garrison in your employ in the summer of 1940?

A. We did.

[fol. 94] Q. And he was employed on one of the ferry boats which your company operates?

A. That is right.

Q. And your company operates ferry boats between what points?

A. Chester, Pennsylvania, and Bridgeport, New Jersey.

Q. And did you discharge him some time in October, 1940?

A. I——

Mr. Somers: I object to that. It is a leading question. He can ask the witness whether Garrison continued in his employ.

Judge Maris: I will permit that question. That is too fine. Proceed.

By Mr. Wolf:

Q. Did you discharge him some time in October of 1940?

—. I could not swear to that because I do not know the date. The dates were given to your man when your man called at the office and requested them.

Q. Yes.

[fol. 95] A. I do not have the dates with me and I would not state that.

Q. Is this the card which you gave to someone in the Delaware-New Jersey Ferry Company? No, it is over here. (Turns card over.)

A. Probably the material on this side is, but the material on this side is not.

Q. That is correct. I am showing you that side of the object—is that the card which you gave to him?

A. This is the card the young lady in the office gave to him. It is in her handwriting.

Q. Does that refresh your memory as to when Herbert Garrison was discharged, if he was discharged?

A. It does not refresh my memory. It refreshes this to me, that on October 29th was the end of that week's pay which ended his term that he worked for us as probably an extra man.

Q. October 29, 1940?

A. That is right.

Q. That was the date on which his employment termi-
[fol. 96] nated?

A. That is right.

Q. Now, was he discharged?

A. He probably was discharged for the simple reason that he was an extra man.

Q. And why was he discharged?

A. He was discharged because at the time for the period in October, in the ferry business all crews are reduced, and you *main*tain at that time your best men.

Q. Now, are you telling the Court under oath here that that is the statement you made to various men in the Delaware-New Jersey Ferry Company with whom you have discussed this matter, and is that statement under oath now the statement which you made to me in the corridor yesterday morning? Answer that question yes or no.

A. In my opinion——

Q. It is not a question of opinion: it is a question of fact. Are you now telling the Court under oath what you told me in the corridor yesterday morning before you spoke to
[fol. 97] Captain Bradley, and what you said to Captain Garrison and Mr. Josendale and Captain McAndrew?

A. I don't recall what I said to you.

Mr. Wolff: All right. If Your Honor please, I will ask that this witness be detained in court till I can put testimony on to prove what he did say, and I will leave Your Honor to deal with him as you see fit.

Judge Maris: Is that all the questions you have to ask him?

Mr. Wolff: All I want to ask him now. I am going to put in evidence——

Mr. Somers: May I have the card?

Mr. Wolff: Surely.

I want to say in reference to this card something typed on the back of it——

Mr. Somers: May I question the witness?

Judge Maris: Cross-examine.

(Addressing Mr. Wolff): You take your seat.

Mr. Somers: May I have that marked for identification, please, our exhibit 16?

(A card was marked Board's Exhibit No. 16.)

[fol. 98] Cross-examination.

By Mr. Somers:

Q. Mr. Kapelski, I show you what has been marked Board's Exhibit 16 for identification, and ask you whether that is the card that Mr. Wolff just showed you in connection with the inquiry as to when Herbert Garrison's employment terminated with you. Let me ask you if that is the card.

A. That is the card.

Q. Now, whose card is that?

A. That is a card which was given to Mr. Josendale in our office when he called there requesting the period of time that Herbert Garrison was in our employ.

Q. Was that a card belonging to the Delaware River Ferry Company—your company?

A. That is right. That is a copy of our card in our files.

Q. I say, it is one of your form cards; is that right?

A. That is correct.

Q. Now, when did Mr. Josendale call at your office?

[fol. 99] A. I don't recall the date or time.

Q. I mean to say, did he call this year or the year before, or the year before that?

A. This year.

Q. Can you tell us your best recollection as to how long ago he called on you?

A. I couldn't state the exact time because I do not know. It is probably six weeks ago—it may have been four weeks ago; it may have been three weeks ago.

Q. I see. But between three and six weeks ago he called at your office. Had you ever seen Mr. Josendale before?

A. No, sir.

Q. Is that the first time anybody from the Delaware-New Jersey Ferry Company came to you to speak to you about Herbert Garrison?

A. That is right.

Q. And you would be the person who would normally be spoken to in connection with the employment record of any employee?

A. That is right.

Q. How long have you been in your present position with [fol. 100] the Delaware River Ferry Company, Mr. Kapelski?

A. Twelve years.

Q. Twelve years?

A. That is right, twelve years.

Q. Now I show you the back of that card—the side of the card that Mr. Wolff did not show you——

Mr. Wolff: If Your Honor please, I was going to explain to counsel——

Mr. Somers: Just a moment, sir; I am questioning here.

Mr. Wolff: —what appears on the back of this card.

Mr. Somers: I object to that. I object to any comment or interpolation.

Judge Maris (addressing Mr. Wolff): Do you wish to be sworn?

Mr. Wolff: No, I don't, if Your Honor please.

Judge Maris: How can you say what is on the card?

[fol. 101] Mr. Wolff: I object to the innuendoes.

Mr. Somers: I am identifying the side that was not shown to the witness, sir.

Judge Maris: All right, gentlemen.

Mr. Somers: I am sorry. I apologize to the Court for raising my voice, but this is a controversial matter and counsel's remark was improper.

Judge Maris: You may proceed with your examination in order.

Mr. Somers: I merely want the acknowledgement of the Court that I apologize to the Court for my raised voice.

Judge Maris: Your apologies are accepted.

By Mr. Somers:

Q. Now I show you the reverse side and ask you just how did the data appearing on the reverse side come to be placed on that card.

Judge Maris: If you know.

By Mr. Somers:

Q. If you know.

A. I do not know.

Q. Was that put there in your presence?

A. No, sir; it was not put there in my presence, and it [fol. 102] was not put there in my office.

Q. I see. In other words, the only side of the card, Labor Board's Exhibit 16 for identification, which was filled out

is the part bearing the name of Herbert Garrison, and having the various weekly dates—that is, for weeks ending certain periods, 8/6, 8/13, 8/20, 10/22, 10/29—an oblique line between each two numbers—and indicating how much you paid for each week.

A. How much he was paid and his Social Security number.

Q. Did you turn over this card with the entries on this matter to Mr. Josendale?

A. That is right.

Q. How was the other side—the reverse side of the card—when you gave it to Mr. Josendale?

A. It was blank, because we just gave him the information which he requested, which was on that one side of the card—the time which the man worked for us, the period of time he worked for us, and the amount of wages he was paid, and if he was discharged, and we told him he was.

Q. When, for the first time, Mr. Kapelski, did you see [fol. 103] this notation on the reverse side of Board's Exhibit 16 for identification?

A. Well, I just seen it now; I had no reason to see it before.

Q. I see. When it left your hands it was completely blank?

A. That is correct.

Mr. Somers: I ask to have that marked in evidence, please, as Board's Exhibit 16. Does the Court want to see it?

Judge Maris: No, I don't want to see it. I don't believe this is a proper time for you to offer exhibits, now; I think it is the respondent's case.

Mr. Somers: Oh, this is cross-examination.

Judge Maris: You can have it marked, of course, and perhaps in rebuttal you can offer it, or at the proper time you can offer it.

Mr. Somers: I just want to get that clear.

Judge Goodrich: What are you offering it for? To show the wages this man received?

Mr. Somers: No; it appears there is a notation on the [fol. 104] reverse side of the card "Discharged 10/29/40. Unfit for any position with the company." That note was not made by this witness or by anyone in connection with the Delaware River Ferry Company.

Judge Maris: What does that prove?

Mr. Somers: And it was made after it was turned over to Mr. Josendale.

Judge Maris: Suppose it was; what does that prove?

Mr. Somers: Here was a card given by the Delaware River Ferry Company to this respondent here.

Judge Maris: Suppose you picked up a blank piece of paper on the street and it has on the bottom of it, written, that A. Norman Somers is a constant liar? Does that prove anything? I don't think so.

Mr. Somers: No, I would say that if something was put upon the card, let us say——

Judge Maris: If you could prove who put it there it might corroborate something or prove something, but you hadn't done that yet.

[fol. 105] Mr. Somers: Well, I would think the inference was that it was put there by this respondent on a card purporting to be the card of the Delaware River Ferry Company.

Judge Maris: That is highly immaterial.

Mr. Somers: I will withdraw the offer then, if the Court feels that way about it.

Judge Maris: It may become material later, but at this stage it is not.

Mr. Somers: That is all with this witness, then.

The Witness: Must I remain here?

Judge Maris: Do you want this witness held?

Mr. Wolff: I would like him held, yes, if Your Honor please. I am going to call a number of witnesses.

Judge Maris: Oh, he is available, I think. If he is needed, he may be recalled. You may go.

Mr. Wolff: All right.

The Witness: Thank you.

Judge Maris: Do you have a short witness?

Mr. Wolff: No, I don't think so, Your Honor.

[fol. 106] (Testimony of September 16, 1942.)

Louis Kapelski, recalled.

Direct examination:

The Witness: Your Honor, I think you clearly understand the full set-up.

Judge Maris: You were asked to tell the truth yesterday, and we do not think you did.

The Witness: I told the truth as far as I was concerned when they asked the question why I discharged the man.

Judge Maris: Suppose you sit down and we will ask you a few questions.

By Judge Maris:

Q. Perhaps you did not understand the questions. We felt, however, that your answers were so evasive as to amount to contempt. You were asked as to whether you had employed Garrison.

A. That is right.

Q. And you testified, as I recall, that you had employed him during the strike at Newcastle, and you had let him go some time, I think, in late October, and you were asked, as I recall it, what the reason was for your letting him go. Now, I think you testified that there was no more work for him, did you not?

[fol. 107] A. I testified, if I recall, Your Honor, that in the ferry business approximately October 29 is after all slow and you discharge men, and if I recall this fellow's record, he did not work steady at any time there. He made one full week during his period of time there.

Q. Was his work satisfactory?

A. Was his work satisfactory?

Q. Yes.

A. I think I stated yesterday that he wasn't a satisfactory worker.

Q. What was the trouble with his work? In what way was he not satisfactory?

A. In our opinion, as far as we are concerned, everybody in their own business has a different opinion as to how they class a worker. Naturally we pass ours on our own men, and the probability is we observe the man through his appearance and so forth.

Q. You know what we mean. Was he satisfactory to you? Was he a satisfactory man for you to employ permanently if you had work for him?

A. If I were to employ him permanently? I would not employ him permanently.

[fol. 108] Q. I asked if he was so satisfactory in his work that you would have employed him. You know what I mean.

A. I would not permanently, no.

Q. Tell us why.

A. Well, as I stated, his appearance for one thing. His appearance was not what it should be for a workman at that type of work, and for the amount of compensation he was receiving for doing it.

Q. And what work was he doing?

A. Deck hand on a vessel, and at that time there I think his wages were approximately $37.44 a week, something like that, for a 48-hour week, and as deck hand naturally you are in one sense nursemaid to a boat, and you direct the public onto the boat, see that they are properly parked and checked, and work under the captain's direction at all times. From my observation there at times, well, I would say no.

Q. You had some conversations with Mr. Josendale and Mr. McAndrew, did you not, before you came to court? You said that you did.

A. I said yesterday that I did.

[fol. 109] Q. Did you not tell them that this man's work was unsatisfactory, and that you would not employ him again?

A. That is right.

Q. Or words to that effect?

A. That is right; words to that effect, except I just stated right here, for a steady man we will not employ him steady now, but I think, if you recall his record, he worked off and on there one day and two days, and that is about all we were in need of a man through the period. I do not recall the dates on the card.

Q. Did you state then that he caused you more damage than he was worth?

A. I did not.

Q. You did not?

A. I did not.

Q. Did he cause any damage to the operation of your boats?

A. He could not cause any damage in his capacity.

Q. He was a deck hand?

A. He was a deck hand.

By Judge Goodrich:

Q. You said he did not cause any damage in his capacity. Do you mean as a deck hand, or did he cause any other [fol. 110] damage?

A. No, and it is impossible for him to cause any damage otherwise also, because he has no charge, and he doesn't handle the boat.

By Judge Maris:

Q. He does not, I suppose, direct traffic in and out?

A. He does direct traffic on and off a boat; that is for unloading; and in order to check back I would have to check back the record to see if there was any accident at the time he was directing traffic off and on.

By Judge Goodrich:

Q. You don't remember any now?

A. I do not, sir.

Judge Maris: Are there any questions that either counsel desire to ask?

Mr. Somers: I would like to ask him one question.

Cross-examination.

By Mr. Somers:

Q. As I understand it, the two matters which weighed most heavily with you, or weighed with you at all in judging Herbert Garrison's fitness one is appearance, you did [fol. 111] not like his appearance, and, secondly, he did not appear steadily on the job.

A. That is right.

Q. Did you know that the union to which Garrison belonged was then on strike with the Delaware-New Jersey Ferry Company, and that Garrison was one of the strikers? Did you know that at the time?

A. I knew that, yes, sir.

Q. And did you know that part of the time was taken up doing picket duty in connection with that strike?

A. I wouldn't say that, because—may I answer that in this manner?

Q. Yes.

A. As I recall, they were short men.

Q. I see.

A. We needed men at the time, and under your union agreement, or contract, you must first call upon the union to supply a man to fill that vacancy for the one day, two days, or week, or whatever you may have.

Q. I see.

A. And this was the man that was sent in by the union.

[fol. 112] Q. Then, when you hired him at all, it was only for the brief one or two-day fill-in period?

A. That is correct.

Q. So that his absence during the rest of the period was not absence from duty, it was just absence of work that your company had during the remainder of the period?

A. That is correct. As we need a man, the vacancy occurs there through some men going out for a period.

Q. I see.

A. We may call the union, according to our agreement, or the shop steward, and request a man to fill our vacancy, which we had, and this was the man that was supplied to fill the vacancy.

Q. And other strikers were put on there on the same basis as Mr. Herbert Garrison would fill in occasionally, when you were short-handed?

A. That is right.

Judge Maris: During that period?

Mr. Somers: During that period of July, 1940, and October or November, 1940.

The Witness: That is right.

By Mr. Somers:

[fol. 113] Q. You say that the rate that you paid deck hands was $38 a week?

A. For 48 hours. If I am not mistaken it came to $37.44.

Q. You said something, Mr. Kapelski, about the fact that each company had its own standards, and that you had your own standards of suitable workmen for your company. Now, I call your attention to the fact that the wage rate of a deck hand in the period that Mr. Garrison was working for you and which you were paying then was $38 a week, and at the same time the Delaware-New Jersey Company was paying to deck hands $24 a week. Did you consider your standard of fitness of a crew as higher than that of the Delaware-New Jersey?

A. In one sense. I don't know. It is sort of an unfair question to ask.

Mr. Somers: Yes. I withdraw that.

By Mr. Somers:

Q. I will state this, Mr. Kapelski. Did you have an opportunity

Judge Maris: Do you mean by that that they would take men that slept on duty, whereas perhaps another ferry company would not? Are you getting at that kind of proposition?

[fol. 114] Mr. Somers: No, I am not.

Mr. Kapelski based his bad reaction to Garrison here on his disappearance. He felt that that was a sufficient factor.

By Judge Maris:

Q. You did not base your judgment on his appearance alone, did you?

A. No; on his method of directing and taking care of traffic as they drove off and on the vessel. Those are the things that you observe in a workman; in other words, you like a workman to be on his toes and have a neat appearance, and do a job without anyone having to say anything to him, and always be there, and do as he had to do to avoid accidents. After all, the safety of the public is important at all times.

Judge Maris: Where is that card that has his record? Is it here?

By Judge Maris:

Q. Mr. Kapelski, yesterday after you left, after you testified, and so on, Mr. Josendale testified that he got this card, which I think you identified as having been given to him, a copy of your record made up by your company.

A. Yes.

[fol. 115] Q. He said that while he was there you gave him this card and told him in effect that your considered Herbert Garrison unfit for any position in your company, and that you would not reemploy him, and after he went back in order to assist him in his memory of the thing, he wrote those words, "unfit for any position in the company", on the back of the card. Is that substantially what you told him?

A. That is correct. It is only my opinion, Your Honor.

Q. I understand that. You operate your company according to your opinion. That is all we are asking you for.

A. That is right.

Q. That is substantially what you said?

A. That is right.

Q. Very well.

By Mr. Somers:

Q. In arriving at your opinion, Mr. Kapelski, did you receive a general impression from his appearance and demeanor, or were there any specific instances of negligence or dereliction on Garrison's part which brought you to a [fol. 116] certain conclusion?

A. Well, when a man is working on a vessel; in other words, you judge a man through observation on him, his actions and the things he does, and so on and so forth. Maybe I didn't see enough of the man, but what I did see of him—I mean, this probably wasn't one thing.

Q. Then you said that your conclusion as to Garrison's fitness is based upon your general observation, and I am asking you whether it had any reference to any specific incident, some specific dereliction on his part. Specifically, I would ask you this: did you ever find him drunk on the job?

A. That I could not answer. I couldn't answer that.

Q. When you say you couldn't answer, you mean you cannot answer yes, or you cannot answer no?

A. I cannot answer yes, or I cannot answer no. I do not know from his habits. I didn't follow them closely. All I observed was to follow him from time to time on the boat as he loaded the boat during their runs.

Q. I am not asking you, do you know of his being drunk [fol. 117] or not. I am asking, had you ever seen him drunk on the job, from your observation?

A. To my knowledge, no. I mean, I couldn't; I could say that I didn't.

By Judge Maris:

Q. You do not know? Did you observe that?

A. No.

By Mr. Somers:

Q. Has any report been made to you? I will put it this way: In the course of your duties, if a man was drunk on the ship, would such a report be made to you?

A. That is right, but oftentimes there are things that just happen which never are reported until you catch up with them.

Q. Making that allowance, I am asking you, did you ever receive a report that Garrison was drunk? Was any report made to you that he was drunk?

A. No.

Q. Now, I will ask you whether any report ever came to you that Garrison was asleep on the job?

A. To my knowledge, no.

Q. I will ask you whether you saw, or any report came to you, as to Garrison's having committed some act of [fol. 118] negligence on the job?

Judge Maris: Do you mean, whether he was careless?

Mr. Somers: Some negligence, or any specific act of negligence or dereliction of any kind which bears upon his fitness for his job.

Judge Maris: Perhaps you should put it this way: Did you observe that he was careless in the performance of his duties?

By Mr. Somers:

Q. That is really your complaint, is it not?

A. That is my whole complaint.

Q. What was the nature of the carelessness that you observed?

A. As I stated to the question, in the method in which he handled the public in their cars, in the loading of the vessel. After all, when your boats load and you are carrying your actual capacity loads, you must be careful at all times in the loading of them so that they are properly loaded, and so forth.

Q. Then, your conclusion as to Garrison is based upon his general manner of working, and has no reference to any specific acts or dereliction on his part, such as negli- [fol. 119] gence, such as being off duty, asleep on duty, drunkness, or anything of that kind?

A. Well, I couldn't testify to that, because I have no record of the man doing anything of that nature.

Q. During the summer of 1940, you had other men; that is, other employees of the Delaware-New Jersey Ferry Company, working for you from time to time; is that correct?

A. That is right.

Q. Did you have an opportunity to make a comparison between the employees of the Delaware-New Jersey Ferry Company and those of your company, your steady employees?

The Witness: Will you ask that question again?

By Mr. Somers:

Q. I say, did you have an opportunity to make a comparison, and did you make a comparison, between the employees whom you employed steadily and those who worked for the Delaware-New Jersey Ferry Company?

A. Well, that question, you are coming right back to the [fol. 120] question which you asked some time ago; in other words, whether or not we employed a higher type of men than they do. It kind of puts me on the spot.

Q. I will ask you this: whether you have an opinion—how long have you been in this business, sir?

A. Twelve years.

Q. And you feel capable of judging the relative fitness——

Judge Maris: Now, what possible bearing has that inquiry?

Mr. Somers: I think it has a definite bearing.

Judge Maris: You mean that the group of men that live about New Castle and Pennsville are in a lower level than those around Chester?

Mr. Somers: No, I do not. The company says that Herbert Garrison, who had been a mate for two or three years, and who had been in its employ since 1927, and who up to that time was satisfactory, up to the time of the strike or when it was over was not satisfactory for his purposes to resume his position, his duties as a mate, and the reason [fol. 121] for it is that the Delaware River Ferry Company deemed him unfit for a position. I deem it becomes pertinent here.

Judge Maris: I did not understand that was a reason. I do not see the pertinency.

Judge Goodrich: I do not understand that to be the reason. I do not see why it should evolve into a dispute about the relative merits of the two companies.

Mr. Somers: I will not press it if you deem it is not pertinent.

Judge Maris: You have pressed it a good deal.

Mr. Somers: May I, with Your Honor's indulgence, just read the answer? I will be brief, but with respect to Garrison they said, and I am reading from page 3 of the respondent's answer:

"The respondents further allege and aver that after going on strike in July, 1940, the said Herbert Garrison obtained employment on one of the ferry boats which were then being operated by the Delaware River Ferry Company; that on or about October 29, 1940, he was discharged by said Delaware River Ferry Company as unfit for any position in said company; and that, being mindful of their [fol. 122] responsibility for the safety of the passengers and property carried by them on their ferry boats, and being of the opinion that the said Herbert Garrison was no longer competent and fit to perform any of the duties required of him in his former position, the respondents refused, solely for that reason, to reassign him to his former position as a wheelsman and deck hand, but did assign him, on November 23, 1940, to shore duty as a bridge man."

Now, I have read that one sentence.

Judge Maris: That is true; they made that averment. I do not see how you are going to disprove that by the cross-examination of this witness. You are endeavoring to obtain a rebuttal of that answer in some form by getting him to admit in some way that the standards are different. He has testified to one thing, what his opinion was, what his view was. Now you may cross-examine him as to that, and you have at length, but you are getting afield and you are bringing in matters that were not included in the examination, that are in the nature of your rebuttal.

Mr. Somers: I certainly would not want to press anything that is immaterial. This thing stands out in my mind. [fol. 123] It appears to me, unless I am misreading the answer, that they base their opinion that he was no longer fit to operate or to resume his duties as a mate, upon the fact that the Delaware River Ferry Company discharged him because they did not deem him fit for a position, and the words are taken from their answer.

Judge Maris: Mr. Kapelski deemed him unfit. They evidently did not deem him unfit, because they evidently put him back on a job; that is, this respondent.

Mr. Somers: This respondent put him back on the job as bridge man.

Judge Maris: They evidently did not follow the statement of Mr. Kapelski. They put him back.

Mr. Somers: They said that they found him no longer fit to perform any of the duties of his former position. It may be that the Delaware River Ferry Company did not take that position, that they felt that he was not fit for any job, but it does expressly state here that the reason why they deemed him no longer fit to go back as a mate was that the Delaware River Ferry Company no longer deemed him fit to perform any job.

[fol. 124] Judge Maris: We have discussed it long enough.

Mr. Somers: If Your Honors rule on the question.

Judge Maris: I so rule.

Mr. Somers: No more with this witness.

Judge Maris: Mr. Kapelski, the Court thinks that you have fully purged yourself. There may have been intimidation in this case. That is a matter we are going to go into later, but we feel that you have fully purged yourself, and you are excused. You may go.

The Witness: I may leave for the day?

Judge Maris: You may leave for the day.

The Witness: Thank you.

Judge Maris: Is the United States Attorney here, represented by Mr. Rettew?

Mr. Rettew: Yes, sir."

[fol. 125] In United States Circuit Court of Appeals for the Third Circuit, October Term, 1941

No. 8140

In Re William V. Bradley

Before Maris and Goodrich, Circuit Judges

Order and Judgment—Filed September 28, 1942

And Now, September 28, 1942 after full hearing and consideration of the testimony presented in open court upon the return of the rule to show cause heretofore entered herein the court now finds that

On September 14, 1942 at about 10.15 o'clock A. M. and about fifteen minutes before the scheduled commencement of the hearing by this court of a certain proceeding pending in this court entitled National Labor Relations Board v. Delaware-New Jersey Ferry Company, No. 7850, in the corridor of the United States Courthouse outside of and adjoining the court room of this court in Philadelphia, the respondent above named, William V. Bradley, did utter words which were calculated to and intended to intimidate one Louis Kapelski, a prospective witness then and there voluntarily attending the opening of this court for the purpose of giving testimony in the above mentioned cause on behalf of the respondent therein.

[fol. 126] The court further finds that the words so uttered by the respondent Bradley did intimidate the said Louis Kapelski to the effect that he gave before this court false, perjured and incomplete testimony upon the hearing of the said cause.

From the foregoing facts it is adjudged by the court that the respondent William V. Bradley did thereby commit a contempt of this court for which contempt it is by the court now ordered and adjudged that the said William V. Bradley be imprisoned for the period of six months and pay a fine of $500.00 and stand committed until the sentence is complied with.

It is further ordered that the United States Marshal for the Eastern District of Pennsylvania shall forthwith execute this judgment.

By the Court: Albert B. Maris, Circuit Judge.

[File endorsement omitted.]

[fol. 127] In United States Circuit Court of Appeals for the Third Circuit

[Title omitted]

Before Maris and Goodrich, Circuit Judges

Order Amending Judgment—Filed October 1, 1942

And Now, October 1, 1942, It Is Ordered that so much of the order and judgment entered by this court herein on September 28, 1942, as reads as follows:

"From the foregoing facts it is adjudged by the court that the respondent William V. Bradley did thereby commit a contempt of this court for which contempt it is by the court now ordered and adjudged that the said William V. Bradley be imprisoned for the period of six months and pay a fine of $500.00 and stand committed until the sentence is complied with."

be and the same hereby is amended so as to read as follows:

From the foregoing facts it is adjudged by the court that the respondent William V. Bradley did thereby commit a contempt of this court for which contempt it is by the court now ordered and adjudged that the said William V. Bradley be imprisoned for the period of six months.

By the Court: Albert B. Maris, Circuit Judge.

[File endorsement omitted.]

[fol. 128] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 129] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1942

No. 473

ORDER ALLOWING CERTIORARI—Filed October 26, 1942.

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office - Supreme Court, U. S.
FILED
OCT 22 1942
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 473

IN RE WILLIAM V. BRADLEY,
Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

THOMAS D. MCBRIDE,
Counsel for Petitioner.

INDEX.

Subject Index.

	Page
Petition for writ of certiorari	1
Statement of the case	2
Questions presented	8
Reasons relied upon for allowance of the writ	10
Prayer for writ	10
Brief in support of petition	12
Jurisdiction	12
Petitioner committed no act of misbehavior constituting a contempt of the authority of the court either in its presence or so near thereto as to obstruct the administration of justice	12
The findings and the evidence do not bring the case within the statute	16
The sentence of September 28th imposing fine and imprisonment was erroneous	21
The "Order amending judgment" was void	22
A. It was entered in the absence of petitioner	22
B. The jurisdiction of the Court over the case was exhausted upon payment of the fine	26
C. The "Order amending judgment" illegally attempted to increase a sentence which was fully satisfied or at least partly satisfied	30

Table of Cases Cited.

Anderson v. *Denver*, 265 Fed. 3	24
Baldwin v. *Franks*, 120 U. S. 678, 7 Sup. Ct. 656, 30 L. Ed. 766	19
Ball v. *United States*, 140 U. S. 118, 11 Sup. Ct. 761	23
Blackmer v. *United States*, 284 U. S. 421, 52 Sup. Ct. 252	24, 25
Buhler v. *Hill*, 7 F. Supp. 857	32
Buskirk, Ex parte, 72 Fed. 14	31
Camarota v. *United States*, 111 F. (2d) 243	13
Chetwood, Ex parte, 165 U. S. 43, 17 Sup. Ct. 385	12
Cisson v. *United States*, 37 F. (2d) 330	32

Page

Clark v. *United States*, 61 F. (2d) 695 22
Craig, Ex parte, 282 Fed. 138 ..... 18, 29
Caddy, In re, 131 U. S. 280, 9 Sup. Ct. 703 20
Fels v. *Snook*, 30 F. (2d) 187 24
Fisher v. *Hayes*, 6 Fed. 63 25
Fletcher, In re, 107 F. (2d) 666 26
Gompers v. *Bucks Stove & R. Co.*, 221 U. S. 418, 31 Sup. Ct. 492 17
Gompers v. *United States*, 233 U. S. 604, 34 Sup. Ct. 693, 59 L. Ed. 1115 ..... 12, 24
Hill v. *U. S. ex rel. Wampler*, 298 U. S. 460, 56 Sup. Ct. 760 27
Hogan v. *Hill*, 9 Fed. Supp. 333 24
Hopt v. *Utah*, 110 U. S. 574, 4 Sup. Ct. 202 23
Hudgings, Ex parte, 249 U. S. 378, 39 Sup. Ct. 337, 63 L. Ed. 656 17
Hynes v. *United States*, 35 F. (2d) 734 32
Kidwell v. *Zerbst*, 19 F. Supp. 475 32
King v. *United States*, 98 F. (2d) 291, 69 App. D. C. 10 25
Lange, Ex parte, 18 Wall. 163, 21 L. Ed. 872 ..... 22, 25, 27, 32
Michaelson v. *United States*, 266 U. S. 42, 45 Sup. Ct. 18, 69 L. Ed. 162 ..... 17, 24
Millinocket Theatre Inc. v. *Kurson*, 39 F. Supp. 979 16
Moss v. *United States*, 23 App. Cases, D. of C., 485 ..... 22, 27
Myers v. *United States*, 264 U. S. 95, 44 Sup. Ct. 272, 68 L. Ed. 577 ..... 17, 24
Nye v. *United States*, 313 U. S. 33, 61 Sup. Ct. 810 ..... 12, 13, 17, 19
People v. *Connelly*, 27 Cal. A. 372, 150 P. 412 32
People ex rel. Maglori v. *Siman*, 284 Ill. 28 26
Price v. *Zerbst*, 268 F. (2d) 72 25
Robinson, Ex parte, 19 Wall. 505, 86 U. S. 205 ..... 14, 19, 21
Savin, Ex parte, 131 U. S. 267, 9 Sup. Ct. 699 ..... 13, 20
Schwab v. *Bergren*, 143 U. S. 442, 12 Sup. Ct. 525, 36 L. Ed. 218 24
Simmons v. *United States*, 89 F. (2d) 591 32
Spivey v. *McGilvray*, 84 P. (2d) 256 25
State v. *Addy*, 43 N. J. L. 113, 39 Am. R. 547 32
Swan, In re, 150 U. S. 637, 14 Sup. Ct. 225 26
Terry, In re, 128 U. S. 289, 9 Sup. Ct. 77 ..... 13, 25
Tinkoff v. *United States*, 86 F. (2d) 868 25

Page

Toledo Newspaper Co. v. *United States*, 247 U. S. 402, 38 Sup. Ct. 560, 62 L. Ed. 1186 ..... 15, 17
Turner v. *United States*, 66 Fed. 287 23
United States v. *Austin Bagley Corporation*, 31 F. (2d) 229 23
United States v. *Benz*, 282 U. S. 304, 51 Sup. Ct. 113 ..... 28, 32
United States v. *Carter*, 25 Fed. Cases 14740, 3 Cranch C. C. 23 13
United States v. *Emerson*, 25 Fed. Cases 15050, 4 Cranch C. C. 188 13
United States ex rel. Coleman v. *Coxe*, 47 F. (2d) 988 24
Waterman, Ex parte, 33 Fed. 29 24
Watts, In re, 190 U. S. 1, 23 Sup. Ct. 718, 47 L. Ed. 933 18
Whitney v. *Dick*, 202 U. S. 132, 26 Sup. Ct. 584, 50 L. Ed. 963 30
Wilson v. *United States*, 26 F. (2d) 215 22
Wimberley v. *United States*, 119 F. (2d) 713 15
Windsor v. *McVeigh*, 93 U. S. 274, 23 L. Ed. 914 23
Yavorsky v. *United States*, 1 F. (2d) 169 ..... 29, 32

STATUTES CITED.

Judicial Code, Sec. 240a, 43 Stat. 938, 28 U. S. C. A. 347a 1, 10, 12
Judicial Code, Sec. 268, 36 Stat. 1163, 28 U. S. C. sec. 385 ..... 2, 12
Criminal Code, Sec. 135, 35 Stat. 1113, 18 U. S. C. A. 241 19

TEXT CITED.

24 C. J. S. 74 24
24 C. J. S. 1591 24
24 C. J. S. 1589a 32

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 473

IN RE WILLIAM V. BRADLEY.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, William V. Bradley, by his attorney, Thomas D. McBride, respectfully presents to this Court his petition and prays that a writ of certiorari issue under the authority of Judicial Code sec. 240a, 43 Stat. 938, 28 U. S. C. A. 347a, to review the Judgment of Sentence of the United States Circuit Court of Appeals for the Third Circuit, in a summary criminal contempt proceeding entered therein on September 28, 1942, in Cause No. 8140, October Term, 1941, and the Order of said Court purporting to amend said Judgment of Sentence entered on the records of said Court on October 1st, 1942. This petition is filed herein on the 22nd day of October, 1942. There was no Opinion filed by the said Court.

Statement of the Case.

1. Your petitioner, William V. Bradley, is now incarcerated in the Berks County Jail in the City of Reading, State of Pennsylvania, on a commitment of the Clerk of the United States Circuit Court of Appeals for the Third Circuit, dated October 1st, 1942, under cover of a Judgment of Sentence for contempt of that Court under sec. 268 of the Judicial Code, 36 Stat. 1163, 28 U. S. C. sec. 385. The facts leading up to said commitment are as hereinafter stated.

2. On September 14, 1942, there was pending and undetermined in the said Circuit Court of Appeals a petition filed by the National Labor Relations Board as petitioner against the Delaware-New Jersey Ferry Company, Respondent, as of October Term, 1941, Number 7850, to show cause why the said Respondent should not be adjudged in civil contempt of a decree of the said Court. The subject matter of said decree, so far as it is relevant hereto, will be stated in a later paragraph hereof.

3. A hearing on said petition was scheduled to commence before the Hon. Albert Branson Maris and Herbert F. Goodrich, Circuit Judges, at 10:30 a. m. on said September 14, 1942, in the court-room of the said Court situate in the City of Philadelphia on the western side of the second floor of the United States Court House near the Chestnut Street entrance. A public corridor is on the second floor extending from Market Street to Chestnut Street, a distance of approximately 150 yards. The said building houses many other offices and departments of the United States in addition to the courts and court-rooms, although the second floor on said side of the building is exclusively occupied by a number of court-rooms of the District Court and the office of its Clerk, also the court-room of the Circuit Court of Appeals and the office of its Clerk, and in addition thereto a room used by newspaper reporters.

4. On behalf of the Respondent, Delaware-New Jersey Ferry Company, one Louis Kapelski, General Manager of the Delaware River Ferry Company (which company was not a party to the proceeding) on the said 14th day of September, 1942, close to 10 a. m. (R. 12), came to the court house together with one Ludolf Josendale, an official of the Respondent Company. Kapelski was not under subpoena (R. 14) but was voluntarily appearing at the request of Josendale (R. 6, 14).

5. Your petitioner, William V. Bradley, had been requested to appear as a witness on behalf of the National Labor Relations Board. Your petitioner is the President of the United Marine Federation Local No. 333, a Labor Union, whose members or former members had been involved in the proceeding as to which the said Court had issued its decree and in connection with which the National Labor Relations Board had petitioned for a contempt citation, contending that the Company had not restored to duty certain employees in accordance with the said decree of the court. Among those former employees was one Herbert Garrison.

6. Kapelski did not testify on September 14th. He apparently was not called (R. 6) but he was called and did testify on September 15th, 1942, when, by reason of certain testimony given by him, the said Circuit Court of Appeals directed *sua sponte* the entry of a rule to show cause why your petitioner, William V. Bradley, should not be punished for a criminal contempt of said Court, returnable September 21st, 1942, at 10:30 a. m. The United States Attorney for the Eastern District of Pennsylvania was invited to and did enter an appearance as *amicus curiae*. The trial, which was directed to be held upon the return of the Rule, was continued on the motion of the United States Attorney from September 21, 1942 to September 28, 1942.

7. The testimony which was taken stenographically at the trial of your petitioner on September 28, 1942, and duly certified by the Clerk of said Court, shows the following:

Having arrived early at the court house on September 14th, 1942, your petitioner, Bradley, at 10:15 a. m. was leaving the said court house to get a shave before the hearing commenced, when he was hailed by Kapelski, whom he knew (R. 8). Bradley shook hands with Kapelski and Josendale in the public corridor near the Market Street entrance and about 100 yards away from the aforesaid court-room (R. 10, 12). Kapelski then asked Bradley what he was doing, and the latter responded that he was there to testify for the National Labor Relations Board. Kapelski then said that he was there for the purpose of testifying against Herbert Garrison (R. 8). Whereupon Bradley retorted "Well, if you are on their side you are going to get a good fucking" (R. 9). The entire conversation, lasting only a few seconds (R. 15) took place in the presence of and in the hearing of Josendale who was known by Bradley to be on the other side of the case (R. 13). Bradley then continued on to get his shave. Kapelski and Josendale proceeded along the corridor toward the court-room. Kapelski waited around outside the court-room (R. 10) and at approximately 11:30 a. m., not having been called to testify, he left the corridor (R. 14). He testified that his prior agreement with Josendale was that he would be permitted to get back to his office by 11 o'clock (R. 14). Kapelski testified that he did not leave as the result of Bradley's statement (R. 16); that he did not consider that statement to be a threat directed against him (R. 15) but that he understood merely that Bradley meant that he, Kapelski, was on the side which was going to lose the case (R. 15). The outcome of the case could not affect Kapelski (R. 19, 20). Neither Bradley nor Kapelski were parties to the proceedings, but the company for which Kapelski worked,

viz., the Delaware River Ferry Company, has contractual relations with the Union of which Bradley was President, and such contract was not due to expire until April 30, 1943 (R. 7). Kapelski did not construe Bradley's words as being a threat relating to that contract (R. 19, 20).

The prosecution put in evidence the transcript of the testimony of Kapelski given in the civil contempt proceeding to show a variance between his testimony on September 15th and September 16th. It was this testimony which caused the Court to issue the Rule upon your petitioner. The transcript shows that Kapelski testified on the question of the workmanship of Herbert Garrison and that Kapelski's company, which had formerly employed Garrison, had discharged him (R. 54). He stated that Garrison was discharged by his company because he was an extra man and that as of October 29, 1940, the date of the discharge, all crews were reduced and that the company would maintain only the best men (R. 55). He admitted that prior to testifying he had spoken with Garrison (R. 53). On September 16, 1942, Kapelski was recalled and again examined as to the reason for discharging Garrison. He then stated that Garrison was not a satisfactory worker, and that he would not personally employ him permanently (R. 60). When pressed for a reason he stated that it was because of Garrison's appearance (R. 61). Garrison was a deck-hand on a vessel (R. 61). He admitted that he had previously stated to other persons that Garrison's work was unsatisfactory and that he would not employ him again, repeating his statement, however, that Garrison was an extra man at all times, being hired for brief one or two day fill-in periods (R. 61). He admitted further that he had previously told Josendale that he considered Garrison "unfit for any position in the company" (R. 64). This variance in Kapelski's testimony was considered by the said Court to have been caused by Bradley's statement (R. 2)

although Kapelski himself, from the beginning, insisted that it had not been so caused (R. 52, 53).

In defense, Bradley testified as to the conversation of September 14, 1942, between himself and Kapelski substantially as it had been narrated by Kapelski (R. 31). In addition thereto he denied that he intended in any way to threaten Kapelski and that the expression used by him was simply one habitually used on the waterfront (R. 31); that he had nothing to gain by threatening Kapelski (R. 32); that when he used the word "you" he meant the Respondent Company and not Kapelski personally (R. 32), and that the expression merely meant that "the other side" would get a good licking in the law suit (R. 32); that he meant no disrespect whatever to the Court (R. 33) and that he had only been in any court once before in his life (R. 33); that he had never been arrested for any crime (R. 33); that he did not attempt to dissuade Kapelski from testifying (R. 34); that he had not stopped Kapelski to speak with him, and that the conversation would not have taken place had Kapelski not stopped him (R. 34); that the Union, of which he was an official, had a contract with the company of which Kapelski was an official but that there were no negotiations in progress at that time (R. 35); that Garrison was not presently a member of the Union but had been at the time of the strike, out of which the litigation arose (R. 35). He denied that the words used by him could be construed to be a threat (R. 37). He said that the word he used had never been used to mean that someone would get a physical licking, and that its only meaning was as he used it (R. 38). Evidence was also produced on his behalf that his reputation as a decent, law-abiding citizen was good (R. 38, 39).

8. The Court, at the conclusion of the testimony, i.e. on September 28, 1942, entered an "Order and Judgment" adjudging Bradley in contempt and sentenced him to be

imprisoned for the period of six months, and to pay a fine of $500.00 and stand committed until the sentence is complied with (R. 40).

9. An oral application that the Court fix bail to act as a supersedeas pending proper proceedings for review of the said sentence and commitment was forthwith made, argued and denied (R. 40-48).

10. On September 28, 1942, at approximately 1 o'clock p. m., the United States Marshal for the Eastern District of Pennsylvania took Bradley into custody and conveyed him to the Philadelphia County Prison at Tenth Street and Moyamensing Avenue, where he remained until October 7, 1942, when he was removed to the County Prison of Berks County, in the City of Reading, Pennsylvania, and he has remained in said Prison up to the time of the filing of this Petition.

11. On October 1, 1942, at approximately 10:30 o'clock a. m., Timothy J. McElroy, Esquire, one of counsel for your petitioner, on Bradley's behalf, paid in satisfaction of that part of the Judgment imposing a fine as aforesaid the sum of $500.00 in United States currency to the Clerk of the said Circuit Court of Appeals, who thereupon issued his written receipt and entered the satisfaction on the Docket (R. 2).

12. As the proceedings thus stood your petitioner had paid the fine theretofore imposed upon him by the said Sentence of the Court and had entered upon the service of the said Sentence of imprisonment.

13. Some hours after the said fine was paid and entered on the Docket, more particularly on the afternoon of October 1, 1942, the said Court, in the absence of your petitioner, and without notice to your petitioner or his counsel, and without giving an opportunity to either of them to

say why further judgment should not be pronounced, filed an Order amending the aforesaid Sentence by directing the elimination of the fine of $500.00, but re-imposing the Sentence of six months' imprisonment (R. 70).

Questions Presented.

14. Your petitioner avers that the Order and Judgment of Sentence entered by the said court on September 28th, 1942, as aforesaid, is erroneous, for the following reasons:

(a) Your petitioner did not behave himself in such manner as to constitute a contempt of the authority of the said Court. (See Brief, *infra*, p. 12.)

(b) Your petitioner committed no act of misbehavior in the presence of the Court. (See Brief, *infra*, pp. 12-13.)

(c) Your petitioner committed no act of misbehavior constituting a contempt of the authority of the Court so near to the presence of the Court as to obstruct the administration of justice. (See Brief, *infra*, pp. 13-16.)

(d) Your petitioner committed no act of misbehavior disrupting to quiet and order or actually interrupting the Court in the conduct of its business. (See Brief, *infra*, pp. 13-16.)

(e) At the time of the alleged misbehavior the said court was not in session. See Brief, *infra*, pp. 13-16.)

(f) On September 14th, 1942, at 10:15 a. m., your petitioner was not under or subject to the authority of the said Court in that he is not and was not an officer of said Court.

(g) On September 14th, 1942, at 10:15 a. m., your petitioner was not under or subject to the authority of the said Court in that he was not then a witness under any

lawful writ, process, order, rule, decree or command of the said Court.

(h) On September 14th, 1942, at 10:15 a. m., the said Louis Kapelski was not under or subject to the authority of the Court. He was not an officer of said Court, nor was he a witness under any lawful writ, process, order, rule, decree or command of the said Court. (See Brief, *infra*, pp. 19-20.)

(i) The evidence was insufficient to justify a finding beyond a reasonable doubt that your petitioner was guilty of a criminal contempt of said Court. (See Brief, *infra*, pp. 16-18.)

(j) The sentence imposed, to wit, fine and imprisonment, was in excess of the punishment which the Court has jurisdiction to impose. (See Brief, infra, pp. 21-22.)

15. Your petitioner avers that the Order of October 1st, 1942, purportedly amending the Judgment of Sentence imposed on September 28th, 1942, and the commitment of your petitioner in consequence thereof, as aforesaid, are void in that the said Order being in effect a re-sentence was beyond the jurisdiction of said Court and in excess of the jurisdiction of the said Court, for the following reasons:

Petitioner avers, without re-stating, reasons (a) to (j), inclusive, as stated in Paragraph 14 above, and in addition thereto:

(k) Said Amended Sentence was not entered or pronounced in open court but merely filed with the Clerk in the absence of your petitioner and his counsel and without notice to your petitioner or his counsel and without any opportunity whatever having been given to your petitioner or his counsel to be heard thereon. (See Brief, *infra*, pp. 22-26.)

(l) The Court was without authority to enter any Order or re-sentence whatever since its power had been exhausted upon the payment by your petitioner of the fine imposed upon him by the sentence of September 28th, 1942. (See Brief, *infra*, pp. 26-30.)

(m) The said Order illegally increases the term of imprisonment imposed on September 28th, 1942, by three days despite the fact that petitioner had already entered upon service of the sentence imposed on September 28th, 1942. (See Brief, *infra*, pp. 30-32.)

Reasons Relied Upon for Allowance of Writ.

16. (a) The Judgment of September 28th, 1942, adjudging your petitioner guilty of a contempt of court constituted an erroneous decision of an important question of Federal law which has not been but should be settled by this Court.

(b) The sentence of September 28th, 1942, imposing fine and imprisonment when the Court has jurisdiction to impose only fine *or* imprisonment, constitute an erroneous decision of a Federal question in conflict with the applicable decisions of this Court.

(c) The Order amending Judgment dated October 1st, 1942, upon which petitioner is being held in jail, was so violative of the principles of natural justice and in merely filing it the Court so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

WHEREFORE your petitioner respectfully prays that a writ of certiorari under Judicial Code sec. 240a, 28 U. S. C. A. 347a be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Third Circuit to certify and send to this Court for its review and determination on a day certain to be

therein named a full and complete transcript of the record and all proceedings in the cause entitled and numbered on its docket In re: William V. Bradley, October Term, 1941, No. 8140; that the said Sentence of September 28th, 1942, and the Order of October 1st, 1942, purporting to amend the said Sentence of September 28th, 1942, of the United States Circuit Court of Appeals for the Third Circuit may be reversed and set aside by this Honorable Court and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

And your petitioner will ever pray.

WILLIAM V. BRADLEY,
By THOMAS D. MCBRIDE,
Attorney for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I.

Jurisdiction.

This Court has jurisdiction to review the judgment of the Circuit Court of Appeals by certiorari under the authority of Judicial Code, Sec. 240a, 28 U. S. C. A. 347a. Criminal contempt proceedings were reviewed by certiorari in Ex parte Chetwood, 165 U. S. 43, 17 S. Ct. 385, 392; *Gompers* v. *United States*, 233 U. S. 604, 34 S. Ct. 693; *Nye* v. *United States*, 313 U. S. 33, 61 S. Ct. 810. The original Judgment of Sentence was entered on September 28th, 1942. The "Order Amending Judgment" was filed October 1st, 1942.

II.

Petitioner Committed No Act of Misbehavior Constituting a Contempt of the Authority of the Court Either in Its Presence or so Near Thereto as to Obstruct the Administration of Justice.

Section 268 of the Judicial Code, 36 Stat. 1163, 28 U. S. C. sec. 385, 28 U. S. C. A. sec. 385, provides as follows:

> "The said courts shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority; Provided, That such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts."

The conversation between Bradley and Kapelski took place at 10:15 a. m. (R. 40) while the court was not in session and was not due to sit until 10:30 (R. 40); it took place one hundred yards away from the court-room in a public corridor of the court house building (R. 12). It did not take place in a hallway of the court itself which was actually set apart for and used by the court as in *Ex parte Savin*, 131 U. S. 267, 9 S. Ct. 699, nor in a grand jury room as in *Camarota* v. *United States*, 111 F. (2) 243 (3 Cir.); nor was it an act of violence in the court-room as *In re Terry*, 128 U. S. 289, 9 S. Ct. 77, or in an entryway separated from the court-room by a cloth as in *United States* v. *Emerson*, 25 Fed. Cases 15050, 4 Cranch C. C. 188; nor threats repeated in the presence of the court, as in *United States* v. *Carter*, 25 Fed. Cases 14740, 3 Cranch C. C. 23. It is clear, we submit, that the act, whatever its nature, did not occur "in the presence of the court."

The question arises—assuming, but not conceding, that it was a contempt of the authority of the court,—Did it take place "so near thereto as to obstruct the administration of justice."

In *Nye* v. *United States*, 313 U. S. 48, 61 S. Ct. 815, this Court said that these words must be given a geographical and not a causal connotation. Hence, it is an obstruction produced by the geographical contiguity of an act that is the essential element and not the result which follows as a matter of proximate causation. As pointed out in the Dissenting Opinion, the Nye case holds, in principle, that the "surreptitious tampering with witnesses, jurors or parties in the presence of the court, although unknown to it, would be summarily punishable because in its presence, but that if it took place outside the court-room or while the witness, juror or party was on his way to attend court it would not be [summarily] punishable, because geographical nearness

is not an element in making the contemptuous action an obstruction of justice" 313 U. S. at 54, 61 S. Ct. at 818.

In the Nye case, as stated in the Opinion of the Court (313 U. S. at 50, 61 S. Ct. at 816), the Court was not stating the permissible constitutional limits of the contempt power but was concerned only in interpreting the Act of Congress. The distinction was made by the Act, this Court did not create it. Indeed, the opinion of the Court stated no new principle but merely brought its own decisions, as well as the decisions of other federal courts, back to the clear and convincing statement of this Court in Ex parte Robinson, 19 Wall. 505, 86 U. S. 205. Nothing stated in Ex parte Savin, supra, is in conflict with this view, for in that case this Court did not attempt to determine whether the contemptuous conduct of Savin "was so near to its presence" as to obstruct justice, but decided merely that the contemptuous conduct occurred "in its presence." The improper influence which Savin attempted to exert on the subpoenaed witness Flores first occurred in the jury-room which the court itself had set apart for witnesses, and, secondly,—not in a public corridor as here—but in a hallway of the court-room which had also been set apart for the use of the court. The Court said:

> "The jury-room and hallway where the misbehavior occurred, were parts of the place in which the court was required by law to hold its sessions * * *. We are of opinion that within the meaning of the statute, the court, at least when in session is present in every part of the place set apart for its own use, and for the use of its officers, jurors and witnesses; and misbehavior anywhere in such place is misbehavior in the presence of the court." 9 S. Ct. at 702.

It must not be forgotten that the condemned conduct must "obstruct the administration of justice." An act which proximately results in obstruction is not enough, the

act itself must obstruct: *Nye* v. *United States, supra.* The case of *Toledo Newspaper Co.* v. *United States,* 247 U. S. 402, 38 S. Ct. 560, 62 L. Ed. 1186, which gave a causal connotation to the statute, is no longer law.

The true rule seems to be that where misbehavior occurs in the presence of the court it is summarily punishable whether it immediately obstructs the administration of justice or not; but if it takes place "near" the court the misbehavior itself must be an actual obstruction.

In Ex parte *Robinson,* supra, this Court summed up the Statute as follows:

> "As thus seen, the power of these courts in the punishments of contempts can only be exercised to insure order and decorum in their presence, to secure faithfulness on the part of their officers in their official transactions, and to enforce obedience to their lawful orders, judgments and processes."

Thus it is seen that though the misbehavior may occur in the vicinity of the court the effect of the misbehavior itself as distinguished from conduct resulting therefrom must be felt in the court-room. In the *Nye* case, supra, the Court said of the contemptuous act under discussion:

> "The fact that in purpose and effect there was an obstruction in the administration of justice did not bring the condemned conduct within the vicinity of the court in any normal meaning of the term. It was not misbehavior in the vicinity of the court disrupting to quiet and order or actually interrupting the court in the conduct of its business."

In *Wimberley* v. *United States,* 119 F. (2) 713, (5 Cir.), the Court, speaking of the *Nye* case, says, p. 714:

> "The gist of the decision is that if the misconduct does not disrupt quiet and order or actually interrupt

> the court in the conduct of its business the offender may not be summarily punished for contempt."

See also: *Millinocket Theatre Inc.* v. *Kurson, et al.*, 39 F. Supp. 979, D. C. Maine. Mr. Justice Holmes, dissenting in the *Toledo Newspaper* case, supra, although he did not insist upon a spatial construction of the words "so near thereto", did say:

> "When it is considered how contrary it is to our practice and ways of thinking for the same person to be accuser and sole judge in a matter which if he be sensitive, may involve strong personal feeling, I should expect the power to be limited by the necessities of the case to insure order and decorum in their presence as it is stated in Ex parte Robinson, 19 Wall. 505, 22 L. ed. 205. See Prynne, Plea for the Lords, 309, cited in McIlwain, The High Court of Parliament and its Supremacy, 191. And when the words of the statute are read it seems to me that the limit is too plain to be construed away." 247 U. S. 402, 38 S. Ct. 560 at 565.

How can a conversation between two men, taking place in a public corridor one hundred yards away from the courtroom, while the court was not in session and the judges not upon the bench, disrupt quiet and order or actually interrupt the court in the conduct of its business? It could do it only by causing some later act which does take place in the presence of the court and actually obstructs justice. Such proximate causation is not enough.

III.

The Findings and the Evidence Do Not Bring the Case Within the Statute.

Petitioner was presumed to be innocent and it was therefore essential that the court find defendant guilty of criminal contempt only if it found all essential elements

to have been proved beyond a reasonable doubt. This principle is applicable to criminal contempts: *Michaelson* v. *United States*, 266 U. S. 42, 45 S. Ct. 18, 69 L. Ed. 162, 39 A. L. R. 451; *Gompers* v. *Bucks Stove & R. Co.*, 221 U. S. 418, 31 S. Ct. 492. This is so despite the fact that defendant is not entitled to a jury trial within the provisions of the Sixth Amendment: *Myers* v. *United States*, 264 U. S. 95, 44 S. Ct. 272.

The specific findings of the court show that this was not done. It may be that a judgment itself imports the proper findings, yet where the findings, as stated, show affirmatively that the essential findings were not made the court is without jurisdiction to impose judgment of sentence.

The Order and Judgment of September 28th, 1942, shows that the Court "now finds that. * * * " (R. 69):

(a) The court was not in session (R. 70);

(b) The misbehavior took place outside of the courtroom (R. 70);

(c) Kapelski was not under subpoena (R. 70);

(d) Bradley intended to and did intimidate Kapelski (R. 70);

(e) As a result Kapelski gave perjured testimony (R. 70).

Thus it is seen that there was no finding that the act of intimidation obstructed justice or disrupted quiet and order or actually interrupted the court in the conduct of its business: *Nye* v. *United States*, 313 U. S. at 52, 61 S. Ct. at 817.

There was no finding of an actual obstruction of justice even resulting from Bradley's conduct since perjury is not *in se* such obstruction: Ex parte Hudgings, 249 U. S. 378, 39 S. Ct. 337, 63 L. Ed. 656.

The whole finding and judgment proceeds upon the rejected doctrine of proximate causation stated in *Toledo Newspaper Co.* v. *United States*, 247 U. S. 402, 38 S. Ct. 560, even though in fairness to the court it should be stated that the court, during the argument, made the unreported comment that that case was no longer the law.

Apart from the findings, however, we contend that the evidence is legally insufficient as a matter of law to support the jurisdiction of the court to impose sentence. This court may look at the evidence to resolve this question: In re Watts, 190 U. S. 1, 23 S. Ct. 718, 47 L. Ed. 933; Ex parte Craig (Hough, J.) 282 F. 138, 154 (2 Cir.).

From the evidence of the prosecution itself it appears:

(a) The conversation between Bradley and Kapelski took place fifteen minutes before the court came upon the bench, not in the court-room or in a place set apart for the use of the court but in a public corridor along which there were court-rooms of another court (R. 8, 10, 12).

(b) Kapelski was coming to the court-room voluntarily and not under subpoena and Bradley knew this (R. 8).

(c) Bradley made no direct and unequivocal threat. The significant word used by him was not understood to be a threat by Kapelski either against himself (R. 15) or against his company (R. 19, 20). The language used is not susceptible of any such interpretation, certainly not beyond a reasonable doubt.

(d) Even if the language be deemed to be ambiguous then the intent with which it was used governs.

(e) Bradley used this language to Kapelski in the very presence of the man on whose side Kapelski intended to testify (R. 13).

Can the Court find as a fact, beyond a reasonable doubt, against all the evidence, both for the prosecution and de-

fense, and the surrounding circumstances, that vulgar language, having no well-defined meaning, which is at its very worst ambiguous, constitutes a threat? We submit not.

The further proposition remains—to our mind serious—that even granting Bradley's conduct constituted misbehavior it constituted no contempt of the *authority* of the court. Section 268 of the Judicial Code, *supra*, says:

> "The said courts shall have power * * * to punish * * * contempts of their authority * * *"

It is seen, therefore, that this statute, being one of limitation: *Ex parte Robinson*, 19 Wall. 505, 86 U. S. 205; *Nye* v. *United States*, 313 U. S. 33, 61 S. Ct. 810, restricts the court to punish only misbehavoir which constitutes a contempt of its *authority*. Mere misbehavior or even criminal conduct does not warrant the exercise of the summary power of the court. The Court had not issued any process whatever to either Bradley or Kapelski; consequently, prior to the actual appearance of either of them in court, it had no authority over them. Neither of them was an officer of the court, nor a party to the proceedings; either of them could have remained away from court for the worst possible motives and still have been beyond the reach of summary punishment. Had Bradley actually bribed Kapelski, in a public corridor, prior to the start of the case and while the court was not in session, it is difficult for us to see how the authority of the court would have been held thereby in contempt. In saying this we do not, of course, contend that such conduct would be beyond the reach of a criminal indictment under sec. 135 of the Criminal Code, 35 Stat. 1113, 18 U. S. C. A. 241; we merely say that in limiting the summary power of a court to the punishment of contempts of its authority the statute means precisely what it says.

In *Baldwin* v. *Franks*, 120 U. S. 678, 692, 7 S. Ct. 656, 30 L. Ed. 766, this Court construed a statute which con-

demned conduct in defiance of the "authority" of the United States. There it was held that to come within the scope of the statute the conduct must be more than a violation of law; it must be an act against the affirmative exercise of the authority of the Government. It must be an act against the Government as a Government. In a court, litigants have the undoubted right to justice and any intentional act interfering with that right is and ought to be punished. But to call the summary contempt power into operation the act must not be a mere wrong to a litigant; it must be a defiance of the court *qua* court.

In *Ex parte Savin*, 131 U. S. 267, 9 S. Ct. 699, relied upon by the prosecution, this Court, in sustaining summary punishment for an attempted bribery of a witness, repeatedly emphasized that the witness was in attendance upon the court under subpoena. The "authority" of the court had been called into operation with respect to that witness, and any attempt to corrupt him was an attack upon the authority of the court and a punishable contempt, if within the limitations prescribed by the statute. In *Cuddy, Petitioner*, 131 U. S. 280, 9 S. Ct. 703, Cuddy attempted to influence a juror who although not impanelled in the particular case was nevertheless under the authority of the court. In the present case the court found that Bradley sought to induce Kapelski—not to violate a subpoena or an order of court but—to commit perjury. But perjury in itself is not a contempt of court: *Ex parte Hudgings, supra*.

The court does not, under this statute, have a general power by summary action to prevent violations of law or obstructions to justice but only such obstructions as constitute a contempt of the court's authority. All other obstructions are left to the ordinary procedure applicable to criminal cases.

IV.

The Sentence of September 28th Imposing Fine and Imprisonment Was Erroneous.

By Judicial Code, sec. 268, *supra*, it is provided that:

> "The said courts shall have power to • • • punish, by fine or imprisonment, at the discretion of the court, contempts of their authority."

Under the law, therefore, the alternative was given to the court either to impose a fine or to imprison; it could not do both.

The Circuit Court of Appeals on September 28th, sentenced petitioner to "be imprisoned for the period of six months and pay a fine of $500.00 and stand committed until the sentence is complied with" (R. 40). The fine, therefore, was not merely collectible from the property of petitioner but the Marshal was directed to and did take him into custody until satisfaction of both aspects of the sentence.

Speaking of the earlier contempt statute, as provided in the Judiciary Act of 1789, this Court, in *Ex parte Robinson*, 19 Wall. 505, 512, 86 U. S. 205, 208, where the District Court exceeded its right to impose only fine or imprisonment by entering an order of disbarment of an attorney, said:

> "The law happily prescribes the punishment which the court can impose for contempts. The 17th section of the Judiciary Act of 1879, 1 Stat. at L., 73, declares that the court shall have power to punish contempts of their authority in any cause or hearing before them, by fine or imprisonment, at their discretion. The enactment is a limitation upon the manner in which the power shall be exercised, and must be held to be a negation of all other modes of punishment."

That a sentence of fine and imprisonment where the statutory authority to impose punishment provides only for fine or imprisonment is illegal although not entirely void, is shown by the decision of this Court in *Ex parte Lange*, 18 Wall. 163 at 174, 21 L. Ed. 872 at 878. This Court said:

> "The judgment first rendered, though erroneous, was not absolutely void. It was rendered by a court which had jurisdiction of the party and of the offense, on a valid verdict. The error of the court in imposing the two punishments mentioned in the statute when it had the alternative of only one of them, did not make the judgment wholly void."

That case involved a violation of a criminal statute against stealing mail bags of the Post Office Department. That the same principle applies to the statutory right of the court to punish for contempt is shown by: *Wilson* v. *United States*, 26 F. (2d) 215; *Moss* v. *United States*, 23 Appeal Cases, D. of C., 485; *Clark* v. *United States*, 61 F. (2d) 695, 709, C. C. A. 8.

V.

The "Order Amending Judgment" Was Void.

A. It was entered in the absence of Petitioner.

As averred in the petition (Paragraph 17k) the order of October 1st, 1942, purporting to amend the sentence imposed on September 28th, 1942, was not entered in open court but merely filed with the Clerk in the absence of petitioner and his counsel; without notice to petitioner or his counsel and while petitioner was effectually prevented from being present by the previous sentence of the court. It is our contention that although the sentence of September 28th, 1942, was illegal and erroneous, this order of October 1st is utterly void. It is a fundamental right

of defendant, under the due process of law provisions of our Constitution, to be present at all stages of the proceeding, including the imposition of sentence: *Hopt* v. *Utah*, 110 U. S. 574, 579, 4 S. Ct. 202. This Court is confronted here with no mere omission of the traditional formalities—usually attendant upon imposition of sentence—sufficient to justify reversal in capital cases: *Ball* v. *United States*, 140 U. S. 118, 129, 11 S. Ct. 761. Of course, it has been held that in misdemeanors it is not necessary for the court to ask the defendant if he has anything to say why sentence should not be pronounced against him: *Turner* v. *United States*, 66 F. 287; *United States* v. *Austin Bagley Corporation*, 31 F. (2d) 229. But this record shows that petitioner was prevented from asserting his fundamental right to be present and to be heard on a matter affecting his personal liberty. The silence of the record is one thing; the positive denial of the right in any case where the facts must be established by testimony, whether civil, criminal or *sui generis* is quite another. Had he been present with his counsel he could have argued against this Order in that:

(a) The fine imposed by the sentence of September 28th had been paid, thus exhausting the further power of the court.

(b) The Amended Order illegally increases the term of imprisonment.

In *Windsor* v. *McVeigh*, 93 U. S. 274, 23 L. Ed. 914, it is said:

> "Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him or giving him an opportunity to be heard, is not a judicial

determination of his rights, and is not entitled to respect in any other tribunal."

The substance of a sentence of imprisonment is that part of it which prescribes the kind and amount of the punishment and the defendant must be present when it is imposed: 24 C. J. S. 74; *Anderson* v. *Denver*, 265 F. 3 (C. C. A. Kansas). These elements of it the court cannot change in the absence of the defendant or where jurisdiction has ceased by the expiration of the term or by the sentence going into execution: *Fels* v. *Snook, Warden*, 30 F. (2d) 187; *Hogan* v. *Hill*, 9 Fed. Supp. 333; *Ex parte Waterman*, 33 F. 29; 24 C. J. S. 1591. Of course it is conceded that since the time and place of punishment or execution are not strictly speaking part of the sentence it is not necessary that accused should be present when a change is made in them: *Schwab* v. *Bergren*, 143 U. S. 442, 12 S. Ct. 525, 36 L. Ed. 218.

In *United States ex rel. Coleman* v. *Coxe*, 47 F. (2d) 988, 990 (5 Cir.), it is said that no final action can be taken in a criminal case against a defendant while he is being detained from the court by action of the Government. Irrespective of the question as to whether a contempt proceeding is a criminal case within the meaning of the Sixth Amendment guaranteeing jury trial which this Court said it was not: *Myers* v. *United States*, 264 U. S. 95, 104, 105, 44 S. Ct. 272, 273, 68 L. Ed. 577, it, nevertheless, partakes of the nature of a criminal case to the extent that defendant is presumed to be innocent, is entitled to be confronted by witnesses against him and to be convicted only if the evidence establishes his guilt beyond a reasonable doubt: *Gompers* v. *United States*, 233 U. S. 604, 34 S. Ct. 693, 59 L. Ed. 1115; *Michaelson* v. *United States*, 266 U. S. 42, 45 S. Ct. 18, 69 L. Ed. 162, 35 A. L. R. 451.

But even in non-criminal cases there must be notice and opportunity to be heard. Although this Court in *Black-*

mer v. *United States*, 284 U. S. 421, 52 S. Ct. 252, sustained the right of the Supreme Court of the District of Columbia, under a special statute, to proceed to judgment in the absence of a recalcitrant witness, it was there pointed out that all the constitutional guarantees as to notice and opportunity to defend had been given. It was there said (284 U. S. at 438, 52 S. Ct. at 255):

> "for the exercise of judicial jurisdiction in personam, there must be due process, which requires appropriate notice of the judicial action and an opportunity to be heard."

Had the first sentence been void the court could have set it aside, brought the defendant before it and pronounced a valid sentence even though the execution of the void sentence had commenced: *Tinkoff* v. *United States*, 86 F. (2d) 868, 880; *King* v. *United States*, 98 F. (2d) 291, 69 Appeals, District of Columbia, 10. But since the first sentence was merely erroneous the Court could not set it aside and pronounce a new sentence: *Ex parte Lange, supra; Spivey* v. *McGilvray*, 84 P. (2d) 256 (Cal.).

A sentence imposed by a federal court on a prisoner in his absence, although he was present when the original sentence was pronounced, is void: *Price* v. *Zerbst*, 268 F. (2d) 72 (Georgia).

It is said in *Fisher* v. *Hayes*, 6 F. 63, 68:

> "It is well settled that contempt of court is a specific criminal offense, and that the imposition of a fine for a contempt is a judgment in a criminal case. New Orleans *v.* Steamship Company, 20 Wall. 387, 392."

The case of *In re Terry*, 128 U. S. 289, 9 S. Ct. 77, does not contradict the rule stated above. Indeed, it recognizes it fully. In that case, however, a contempt was committed in the presence of the court which had full knowledge of the facts and thus was under no obligation

to inform itself by testimony or otherwise and when the defendant fled the court-room this Court held that jurisdiction to vindicate its dignity did not depart along with him. In that case he had no right to notice or opportunity to defend.

B. The jurisdiction of the Court over the case was exhausted upon payment of the fine.

On October 1st, 1942, at approximately 10:30 a. m., as stated in the petition (Paragraph 10), petitioner, through his counsel, paid the $500 fine to the Clerk of the Circuit Court of Appeals. This payment was entered upon the docket by the Clerk (R. 2). The Clerk was the proper person to receive the payment on behalf of the United States: *Ex parte Lange, supra; In re Fletcher,* 107 F. (2d) 666, 668. On the afternoon of the same day the Circuit Court entered its order amending sentence (R. 2, 70). By that Order the Court sought to delete the sentence that Bradley pay the $500 fine but resentenced him to six months imprisonment.

We now contend that by payment of the fine in satisfaction of one of the alternative modes of punishment prescribed by the statute the petitioner was not subject to the further order of the court in that the jurisdiction of the court over him had ceased.

As shown above, the court could not legally impose both punishments but it did have the jurisdiction to impose either one. It therefore follows that a satisfaction of either one which the court had jurisdiction to impose renders the other alternative excessive and in consequence void. We contend that had petitioner endured imprisonment for six months he would have been entitled to his discharge, in that he could not have been held for additional compliance with the fine which had been imposed. For the same reason,

having satisfied that part of the judgment imposing fine, he was and is entitled to be discharged because he cannot be compelled to serve the term of imprisonment.

The case of *Ex parte Lange, supra,* is conclusive on the present question. There it was held that a judgment of a court that had been executed so far as to be in full satisfaction of one of the alternative penalties of the law, put an end to the power of the court over the offense. There, as here, the court had imposed fine and imprisonment when it had authority only to fine or imprison; there, as here, defendant paid the fine; there the court vacated its original order and brought the defendant before it for re-sentence; here the court did not even do that but simply filed its "Order Amending Judgment"; there this Court held that the original judgment of sentence was erroneous but that the second one was void and the defendant was discharged upon habeas corpus.

See also: *Moss* v. *United States,* 23 Appeal Cases, District of Columbia, p. 485; *People ex rel. Maglori* v. *Siman,* 284 Ill. 28.

In *Re Swan,* 150 U. S. 637, 14 S. Ct. 225, it was erroneously ordered by a Circuit Court in a contempt case that defendant be sentenced to imprisonment until restoration of certain goods unlawfully seized and upon such restoration then to three months imprisonment and until payment of costs. On habeas corpus this Court held that petitioner was not entitled to discharge in that he had not suffered any of the alternative punishments provided by statute and that "he cannot be discharged on habeas corpus until he has performed so much of the judgment, or served out so much of the sentence, as it was within the power of the court to impose. Ex parte Lange, 18 Wall. 163; Ex parte Parks, 93 U. S. 18."

In *Hill, Warden* v. *United States ex rel. Wampler,* 298 U. S. 460, 464, 56 S. Ct. 760, 762, it is said that the sentence

is the judgment and that if the entry is inaccurate there is a remedy by motion to correct it to the end that it may speak the truth. That case, however, is no authority for the proposition that where a judgment of sentence is pronounced and execution of it has begun the terms of the judgment itself may be altered. The proposition for which that case stands, so far as it is relevant to the present argument, is merely that the court can correct an error in its own records to the end that those records may speak the truth as to the judgment pronounced. Here there is—and can be—no contention that the record of the court as of September 28th improperly states the judgment of the court. The record showing the imposition of fine and imprisonment was correct because that is exactly the judgment that was pronounced orally (R. 40) and signed by the Court and intended to be entered into the records (R. 69).

The case of *United States* v. *Benz*, 282 U. S. 304, 51 S. Ct. 113, is no authority for the a on of the court in the present case. There it is true the defendant had commenced upon service of the sentence imposed and the court diminished that sentence by subsequent order made within the term. Two distinctions, however, at once appear. First: Such subsequent order was granted on the petition of the defendant himself; Second: the defendant had not fully satisfied one of the alternative punishments which the court had the power to impose.

The following statement in *Ex parte Lange* is particularly apt, (18 Wall. at 176, 85 U. S. at 879):

> "The record of the court's proceedings, at the moment the second sentence was rendered, showed in that very case and for that very offense the prisoner had fully performed, completed and endured one of the alternative punishments which the law prescribed for that offense, and had suffered five days imprisonment on account of

the other. It thus showed the court that its power to punish for that offense was at an end."

The only possible distinction between the Lange case and the present that may be raised by the prosecution is that there the fine, which was paid to the Clerk, was by him paid into the Treasury and hence it was beyond the power of the Court to recall it, whereas here the record does not show such to be the case. But the very Court in which this proceeding arose, i. e. the Circuit Court of Appeals for the Third Circuit, has held this difference to be of no consequence. In *Yavorsky* v. *United States*, 1 F. (2d) 169, that Court reversed the District Court on an appeal in a habeas corpus proceeding where the District Court had not discharged relator where the facts were identical with those in the present case. That Court said (p. 171):

> "After the fine was paid, whether the money representing it was held, during the five days defendant was in jail, by the marshal only, or by the marshal part of the time and by the clerk part of the time, or by the marshal, clerk, and the treasury of the United States, each, part of the time, was of no concern to the defendant, and had no bearing upon the suffering by him of that alternative penalty. When he had fully complied with that part of the sentence, he had as fully suffered that alternative punishment as if the fine had forthwith been deposited into the treasury of the United States by the marshal. The court was without power to remit the fine after the punishment imposed had been suffered, and the writ of habeas corpus should have been allowed, and the prisoner discharged."

Here, however, relief has not been sought yet on habeas corpus because the judgment is that of the Circuit Court of Appeals which has no power to issue writs of habeas corpus: *Ex parte Craig*, 282 Fed. 138 (2 Cir.); certainly not to issue original and independent writs of habeas corpus:

Whitney v. Dick, 202 U. S. 132, 137, 26 S. Ct. 584, 50 L. Ed. 963. The term at which both the original sentence and the re-sentence were imposed expired on October 5th, 1942.

It is at least doubtful whether the District Court could discharge on habeas corpus where relator is committed by the Circuit Court of Appeals. Apart from these considerations, petitioner feels entitled to the broader review available on certiorari.

C. The "Order Amending Judgment" illegally attempted to increase a sentence which was fully satisfied or at least partly satisfied.

The sentence imposed on September 28th, 1942, was that the defendant "be imprisoned for the period of six months and pay a fine of $500 and stand committed until the sentence is complied with. It is further ordered that the United States Marshal for the Eastern District of Pennsylvania shall forthwith execute this judgment" (R. 40, 69).

As the petition recites (Paragraph 10) the said Marshal took petitioner into custody and incarcerated him in the Philadelphia County Prison where he remained at all times until October 7th, 1942, when he was removed to the County Prison of Berks County in the City of Reading, Pennsylvania, and he has remained in that prison up to the time of the filing of the petition.

It is seen, therefore, that petitioner entered upon the execution of that sentence on September 28th, 1942. On October 1st, 1942. the court entered a new Order (R. 70) purporting to amend its original Order. A certified copy of that re-sentence upon which petitioner is now held was transmitted to the United States Marshal on October 1st, 1942 (R. 2). Thus it is seen that the re-sentence dates from October 1st, 1942, and that the six months imprisonment is to be computed from said date because the court said,

"It is by the court *now* ordered and adjudged that the said William V. Bradley be imprisoned for the period of six months" (R. 71). This Order, although purporting to amend a former one, was under its own terms purely prospective and in no sense retrospective. Indeed, it could not have been retrospective or *nunc pro tunc*. In *Ex parte Buskirk*, 72 Fed. 14, 20 (4 Cir.), the Court says:

> "The rule is now well established that nunc pro tunc orders cannot operate to modify orders theretofore made or to take the place of orders intended to be made but omitted. The courts can by such orders supply omissions in the record of what was actually done in the cause at a former time when it was under consideration, and by mistake or neglect not entered in the clerk's minutes or the court's records; but where the court has omitted to make an order which it could have made, and in fact intended to make, it cannot subsequently make the same nunc pro tunc, so as to make it binding upon the parties to the suit from the date when it was so intended to have been entered; and especially is this so in matters relating to criminal proceedings and those involving rules for contempt. Hyde *v.* Curling, 10 Mo. 359; State *v.* Clark, 18 Mo. 432; 1 Bish. Cr. Proc. Sec. 1160; Bank *v.* Dudley, 2 Pet. 522; In re Wight, 134 U. S. 136, 10 Sup. Ct. 487; Bullitt Co. *v.* Washer, 130 U. S. 142, 9 Sup. Ct. 499; Brignardello *v.* Gray, 1 Wall. 627; Nabers *v.* Meredith, 67 Ala. 333; In re Limerick, 18 Me. 183; Smith *v.* Hood, 25 Pa. St. 218."

It is obvious, therefore, that the Order of October 1st imposes upon petitioner an additional term of imprisonment of three days. This is beyond the power of the Court even though done within the term in which the original judgment was entered; it constitutes a violation of the double jeopardy provision of the Fifth Amendment: *Ex parte Lange, supra.*

In *United States* v. *Benz*, 282 U. S. 304, 306, 51 S. Ct. 113, 114, the Court held:

(a) Judgments, decrees and orders are within the control of the court during the term at which they were made;

(b) This rule does not authorize increasing a sentence which has been partly executed.

The sentence of September 28th was not void but merely erroneous: *Ex parte Lange*, 18 Wall. 163, 21 L. Ed. 872; *People* v. *Connelly*, 27 Cal. A. 372, 150 P. 412; *State* v. *Addy*, 43 N. J. L. 113, 39 Am. R. 547.

The general rule is stated to be that where defendant has begun or has completed a valid sentence it is ordinarily beyond the power of the trial court to set it aside and render a new sentence. This is so even during the term at which the sentence was rendered: *Simmons* v. *United States*, 89 F. (2d) 591 (C. C. A. Texas); *Cisson* v. *United States*, 37 F. (2d) 330 (C. C. A. S. Car.); *Hynes* v. *United States*, 35 F. (2d) 734, 735 (C. C. A. Ill.); *Yavorsky* v. *United States*, 1 F. (2d) 169 (C. C. A. Penna.). See cases cited: *Buhler* v. *Hill*, 7 F. Supp. 857 (D. C. Penna.); *Kidwell* v. *Zerbst*, 19 F. Supp. 475 (D. C. Ga.). See generally: 24 C. J. S. 1589a.

Respectfully submitted,

THOMAS D. MCBRIDE,
702 Liberty Trust Building,
Philadelphia, Pennsylvania,
Attorney for Petitioner.

FILE COPY

DEC 11 1942

CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 473

IN RE WILLIAM V. BRADLEY,
Petitioner.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITIONER'S BRIEF.

THOMAS D. MCBRIDE,
Counsel for Petitioner.

INDEX.

Subject Index.

	Page
Opinion below	1
Jurisdiction	1
Statement of the case	2
Questions presented	8
Summary of argument	9
Argument	10
Petitioner committed no act of misbehavior constituting a contempt of the authority of the court either in its presence or so near thereto as to obstruct the administration of justice	10
The findings and the evidence do not bring the case within the statute	16
The sentence of September 28th imposing fine and imprisonment was erroneous	22
The jurisdiction of the court over the case was exhausted upon payment of the fine	24
The "Order amending judgment" was void	28
A. It was entered in the absence of petitioner	28
B. The "Order amending judgment" illegally attempted to increase a sentence which fully satisfied or at least partly satisfied.	31
Conclusion	33
Appendix	34

Table of Cases Cited.

Anderson v. *Denver*, 265 Fed. 3	29
Baldwin v. *Franks*, 120 U. S. 678, 7 Sup. Ct. 656, 30 L. Ed. 766	21
Ball v. *United States*, 143 U. S. 118, 11 Sup. Ct. 761	28
Blackmer v. *United States*, 284 U. S. 421, 52 Sup. Ct. 252	30
Buhler v. *Hill*, 7 F. Supp. 857	33
Camarota v. *United States*, 111 F. (2d) 243	11
Chetwood, Ex parte, 165 U. S. 43, 17 Sup. Ct. 385	1
Cisson v. *United States*, 37 F. (2d) 330	33

	Page
Clark v. *United States*, 61 F. (2d) 695	24
Coleman, United States ex rel., v. *Coxe*, 47 F. (2d) 988	29
Craig, Ex parte, 282 Fed. 138	17
Cuddy, In re, 131 U. S. 280, 9 Sup. Ct. 703	22
Fels v. *Snook*, 30 F. (2d) 187	29
Fisher v. *Hayes*, 6 Fed. 63	31
Fletcher, In re, 197 F. (2d) 666	24
Gompers v. *Bucks Stove & R. Co.*, 221 U. S. 418, 31 S. T. 492	16
Gompers v. *United States*, 233 U. S. 604, 34 Sup. Ct. 693, 59 L. Ed. 1115	1, 30
Hill v. *United States ex rel. Wampler*, 298 U. S. 460, 56 Sup. Ct. 760	25
Hogan v. *Hill*, 9 Fed. Supp. 333	29
Hopt v. *Utah*, 110 U. S. 574, 4 Sup. Ct. 202	28
Hudgings, Ex parte, 249 U. S. 378, 39 Sup. Ct. 337, 63 L. Ed. 656	17
Hynes v. *United States*, 35 F. (2d) 734	33
Kidwell v. *Zerbst*, 19 F. Supp. 475	33
King v. *United States*, 98 F. (2d) 291, 69 App. D. C. 10	30
Lange, Ex parte, 18 Wall. 163, 21 L. Ed. 872	2, 25, 26, 32
Maglori, People ex rel., v. *Siman*, 284 Ill. 28	25
McKee v. *United States*, 126 F. (2d) 470	14
Michaelson v. *United States*, 266 U. S. 42, 45 Sup. Ct. 18, 69 L. Ed. 162	16, 30
Millinocket Theatre Inc. v. *Kurson*, 39 F. Supp. 979	14
Moss v. *United States*, 23 App. D. C. 485	24, 25
Myers v. *United States*, 264 U. S. 95, 44 Sup. Ct. 272, 68 L. Ed. 577	16, 30
Nye v. *United States*, 313 U. S. 33, 61 Sup. Ct. 810	1, 12, 17, 20
Pendergast v. *United States*, No. 183 October Term 1942	14
People v. *Connelly*, 27 Cal. Ap. 372, 150 P. 412	32
Price v. *Zerbst*, 268 F. (2d) 72	31
Robinson, Ex parte, 19 Wall. 505, 86 U. S. 205	13, 20, 23
Savin, Ex parte, 131 U. S. 267, 9 Sup. Ct. 699	11, 21
Schwab v. *Bergren*, 143 U. S. 442, 12 Sup. Ct. 525, 36 L. Ed. 218	29
Simmons v. *United States*, 89 F. (2d) 591	33
Spivey v. *McGilvray*, 84 P. (2d) 256	30
State v. *Addy*, 43 N. J. L. 113, 39 Am. R. 547	32
Swan, In re, 150 U. S. 647, 14 Sup. Ct. 225	25

Page

Terry, In re, 128 U. S. 289, 9 Sup. Ct. 77 ..... 11, 31
Tinkoff v. *United States*, 86 F. (2d) 868 30
Toledo Newspaper Co. v. *United States*, 247 U. S. 402, 38 Sup. Ct. 560 ..... 13, 17
Turner v. *United States*, 66 Fed. 287 28
United States v. *Austin Bagley Corporation*, 31 F. (2d) 229 28
United States v. *Benz*, 282 U. S. 304, 51 Sup. Ct. 113 .. 26, 32
United States v. *Carter*, 25 Fed. Cases 14740, 3 Cranch C. C. 23 11
United States v. *Emerson*, 25 Fed. Cases 15050, 4 Cranch C. C. 188 11
United States v. *Pridgeon*, 153 U. S. 48, 14 Sup. Ct. 746 .. 23
Warring v. *Colpoys*, 122 F. (2d) 470 14
Waterman, Ex parte, 33 Fed. 29 29
Watts, In re, 190 U. S. 1, 23 Sup. Ct. 718, 47 L. Ed. 933 . 17
Wilson v. *United States*, 26 F. (2d) 215 24
Wimberley v. *United States*, 119 F. (2d) 713 14
Windsor v. *McVeigh*, 93 U. S. 274, 23 L. Ed. 914 28
Yavorsky v. *United States*, 1 F. (2d) 169 ..... 27, 33

STATUTES CITED.

Criminal Code, sec. 135, 35 Stat. 1113, 18 U. S. C. A. 241 21
Judicial Code, sec. 240a, 43 Stat. 938, 28 U. S. C. A. 347a 1
Judicial Code, sec. 268, 36 Stat. 1163, 28 U. S. C. A. 385 ..... 2, 9, 10

TEXT CITED.

24 C. J. S. 74 29
24 C. J. S. 1589a 33
24 C. J. S. 1591 29

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 473

IN RE WILLIAM V. BRADLEY,

Petitioner.

PETITIONER'S BRIEF.

Opinion Below.

The Circuit Court of Appeals filed no Opinion. Its findings of fact and Judgment as originally rendered appear at R. 69-70. Its Order Amending Judgment appears at R. 70-71.

Jurisdiction.

This Court has jurisdiction to review the judgment of the Circuit Court of Appeals by certiorari under the authority of Judicial Code, Sec. 240a, 43 Stat. 938, 28 U. S. C. A. 347a. Criminal contempt proceedings were reviewed by certiorari in *Ex parte Chetwood*, 165 U. S. 43, 17 S. Ct. 385, 392; *Gompers* v. *United States*, 233 U. S. 604, 34 S. Ct. 693; *Nye* v. *United States*, 313 U. S. 33, 61 S. Ct. 810. The original judgment of sentence was rendered on September 28th, 1942. The Order Amending Judgment was filed Oc-

tober 1st, 1942. The petition to this Court for granting of Certiorari was filed October 22, 1942, and granted October 26th, 1942.

Statement of the Case.

This case comes here on Certiorari granted October 26, 1942. It is a criminal contempt proceeding under Judicial Code 268, 36 Stat. 1163, 28 U. S. C. A. 385, initiated by and in the Circuit Court of Appeals for the Third Circuit.

On September 14, 1942, there was pending and undetermined in the said Circuit Court of Appeals a petition filed by the National Labor Relations Board as petitioner against the Delaware-New Jersey Ferry Company, Respondent, to show cause why the said Respondent should not be adjudged in civil contempt of a decree of the said Court.

A hearing on said petition, including the taking of testimony, was scheduled to commence before the Hon. Albert Branson Maris and Herbert F. Goodrich, Circuit Judges, at 10:30 a. m. on said September 14, 1942, in the court-room of the said Court situate in the City of Philadelphia on the western side of the second floor of the United States Court House near the Chestnut Street entrance. A public corridor is on the second floor extending from Market Street to Chestnut Street, a distance of approximately 150 yards. The said building houses many other offices and departments of the United States in addition to the courts and court-rooms, although the second floor on said side of the building is exclusively occupied by a number of court-rooms of the District Court and the office of its Clerk, also the court-room of the Circuit Court of Appeals and the office of its Clerk, and in addition thereto a room used by newspaper reporters.

On behalf of the Respondent, Delaware-New Jersey Ferry Company, one Louis Kapelski, General Manager of the

Delaware River Ferry Company (which company was not a party to the proceeding) on the said 14th day of September, 1942, close to 10 a. m. (R. 12), came to the court house together with one Ludolf Josendale, an official of the Respondent Company. Kapelski was not under subpoena (R. 14) but was voluntarily appearing at the request of Josendale (R. 6, 14).

Your petitioner, William V. Bradley, had been requested to appear as a witness on behalf of the National Labor Relations Board. Your petitioner is the President of the United Marine Federation Local No. 333, a Labor Union, whose members or former members had been involved in the proceeding as to which the said Court had issued its decree and in connection with which the National Labor Relations Board had petitioned for a contempt citation, contending that the Company had not restored to duty certain employees in accordance with the said decree of the court. Among those former employees was one Herbert Garrison.

Some testimony was taken on September 14th and 15th, 1942. Kapelski did not testify on September 14th. He apparently was not called on that day (R. 6) but he was called and did testify on September 15th, when, by reason of certain testimony given by him, the said Circuit Court of Appeals directed *sua sponte* the entry of a rule to show cause why your petitioner, William V. Bradley, should not be punished for a criminal contempt of said Court, returnable September 21st, 1942, at 10:30 a. m. The United States Attorney for the Eastern District of Pennsylvania was invited to and did enter an appearance as *amicus curiae*. The trial, which was directed to be held upon the return of the Rule, was continued on the motion of the United States Attorney from September 21, 1942 to September 28, 1942.

The testimony which was taken stenographically at the trial of your petitioner on September 28, 1942, and duly certified by the Clerk of said Court, shows the following:

Having arrived early at the court house on September 14th, your petitioner, Bradley, at 10:15 a. m. was leaving the said court house to get a shave before the hearing commenced, when he was hailed by Kapelski, whom he knew (R. 8). Bradley shook hands with Kapelski and Josendale (the respondent company's official) in the public corridor near the Market Street entrance and about 50 yards (R. 24) or 100 yards (R. 10, 12) away from the aforesaid court-room. Kapelski then asked Bradley what he was doing, and the latter responded that he was there to testify for the National Labor Relations Board. Kapelski then said that he was there for the purpose of testifying against Herbert Garrison (R. 8). Whereupon Bradley retorted "Well, if you are on their side you are going to get a good fucking" (R. 9). The entire conversation, lasting only a few seconds (R. 15) took place in the presence of and in the hearing of Josendale who was known by Bradley to be on the "other side" of the case (R. 13). Bradley then continued on to get his shave. Kapelski and Josendale proceeded along the corridor toward the courtroom. Kapelski waited around outside the court-room (R. 10) and at approximately 11:30 a. m., not having been called to testify, he left the corridor (R. 14). He testified that his prior agreement with Josendale was that he would be permitted to get back to his office by 11 o'clock (R. 14). Kapelski testified that he did not leave as the result of Bradley's statement (R. 16); that he did not consider that statement to be a threat directed against him (R. 15) but that he understood merely that Bradley meant that he, Kapelski, was on the side which was going to lose the case (R. 15). The outcome of the case could not affect Kapelski (R. 19, 20). Neither

Bradley nor Kapelski were parties to the proceedings, but the company for which Kapelski worked, viz., the Delaware River Ferry Company, has contractual relations with the Union of which Bradley is President, and such contract is not due to expire until April 30, 1943 (R. 7). Kapelski did not construe Bradley's words as being a threat relating to that contract (R. 19, 20).

The prosecution put in evidence the transcript of the testimony of Kapelski given in the civil contempt proceeding to show a variance between his testimony on September 15th and September 16th, 1942. It was this testimony which caused the Court to issue the Rule upon your petitioner. The transcript shows that Kapelski on September 15th, 1942, testified on the question of the workmanship of Herbert Garrison and that Kapelski's company, which had formerly employed Garrison, had discharged him on October 29, 1940 (R. 55). He stated that Garrison was "probably" discharged because he was an extra man and that as of October 29, 1940, the date of the discharge, all crews were reduced and that the company would maintain only the "best" men (R. 55). He admitted that prior to testifying he had spoken with Garrison (R. 53). On September 16, 1942, Kapelski was recalled and again examined as to the reason for discharging Garrison. He then stated that Garrison was not a satisfactory worker, and that he would not personally employ him permanently (R. 60). When pressed for a reason he stated that it was because of Garrison's appearance (R. 61). Garrison was a deck-hand on a vessel (R. 61). He admitted that he had previously stated to other persons that Garrison's work was unsatisfactory and that he would not employ him again, repeating his statement, however, that Garrison was an extra man at all times, being hired for brief one or two day fill-in periods (R. 61). He admitted further that he had previously told Josendale

that he considered Garrison "unfit for any position in the company" (R. 64) although he pointed to no specific dereliction (R. 65, 66). This alleged discrepancy in Kapelski's testimony was considered by the said Court to have been caused by Bradley's statement (R. 2) although Kapelski himself, from the beginning, insisted that it had not been so caused (R. 52, 53). In answer to a leading question put to him by the Court he admitted that his reticence in volunteering a full statement of the facts on September 15th "could have been in a sense" due in part to his conversation with Bradley (R. 16), but he said, however, that in reality he was just confused (R. 16). He stated, moreover, that he had not attempted to lie about anything and that he had not fully understood what was asked of him on September 15th (R. 17). Again, in answer to a leading question put to him by the Court, he conceded that he "probably" had in the back of his mind that his company had a contract with Bradley's Union which would be coming up for renewal within the next six months (R. 17). He insisted, however, on further cross-examination, that he did not consider Bradley's words to contain any threat so far as the contract with the Union was concerned (R. 20).

In defense, Bradley testified as to the conversation of September 14, 1942, between himself and Kapelski substantially as it had been narrated by Kapelski (R. 31). In addition thereto he denied that he intended in any way to threaten Kapelski and that the expression used by him was simply one habitually used on the waterfront (R. 31); that he had nothing to gain by threatening Kapelski (R. 32); that when he used the word "you" he meant the Respondent Company (whose official, Josendale, was present) and not Kapelski personally (R. 32), and that the expression merely meant that "the other side" would get a good licking in the law suit (R. 32); that he meant no disrespect

whatever to the Court (R. 33) and that he had only been in any court once before in his life (R. 33); that he had never been arrested for any crime (R. 33); that he did not attempt to dissuade Kapelski from testifying (R. 34); that he had not stopped Kapelski to speak with him, and that the conversation would not have taken place had Kapelski not stopped him (R. 34); that the Union, of which he was an official, had a contract with the company of which Kapelski was an official but that there were no negotiations in progress at that time (R. 35); that Garrison was not presently a member of the Union but had been at the time of the strike, out of which the litigation arose (R. 35). He denied that the words used by him could be construed to be a threat (R. 37). He said that the word he used had never been used to mean that someone would get a physical licking, and that its only meaning was the one intended by him in using it (R. 38). Evidence was also produced on his behalf that his reputation as a decent, law-abiding citizen was good (R. 38, 39).

The Court, at the conclusion of the testimony, i. e. on September 28, 1942, entered an Order and Judgment adjudging Bradley in contempt and sentenced him to be imprisoned for a period of six months, and to pay a fine of $500.00 and stand committed until the sentence is complied with (R. 40).

On September 28, 1942, at approximately 1 o'clock p. m., the United States Marshal for the Eastern District of Pennsylvania took Bradley into custody and conveyed him to the Philadelphia County Prison at Tenth Street and Moyamensing Avenue, where he remained until October 7, 1942, when he was removed to the County Prison of Berks County, in the City of Reading, Pennsylvania, and he remained in said Prison until released on bail by order of this Court dated October 26, 1942.

On October 1, 1942, prior to 11 o'clock a. m., Timothy J. McElroy, Esquire, one of counsel for your petitioner, on Bradley's behalf, paid in satisfaction of that part of the Judgment imposing a fine as aforesaid the sum of $500.00 in United States currency to the Clerk of the said Circuit Court of Appeals, who thereupon issued his written receipt and entered the satisfaction on the Docket (R. 2 and Certificate of Clerk, Brief Appendix).

Some hours after the said fine was paid and entered on the Docket, more particularly on the afternoon of October 1, 1942, the said Court, although not in session, in the absence of your petitioner, and without notice to your petitioner or his counsel, and without giving an opportunity to either of them to say why further judgment should not be pronounced, filed an Order amending the aforesaid Sentence by directing the elimination of the fine of $500.00, but re-imposing the Sentence of six months' imprisonment (R. 70 and Certificate of Clerk, Brief Appendix).

Questions Presented.

Whether petitioner's conduct was such misbehavior as constituted a contempt of the authority of the Circuit Court of Appeals triable summarily without indictment or a jury.

Assuming petitioner's conduct constituted misbehavior, did it take place either in the presence of the Court, or so near thereto as to obstruct the administration of justice?

Whether the sentence imposing both fine and imprisonment where the statute authorized imposition of only fine or imprisonment was void or merely erroneous.

Where the Court, having authority to impose either fine or imprisonment, imposed both, does the payment of the fine satisfy the judgment and entitle petitioner to a discharge?

Can the Court increase the sentence after defendant started upon the service of it?

Can the Court change the sentence in the absence of defendant and without notice to him?

Summary of Argument.

It will be argued by petitioner that he committed no act of misbehavior constituting a contempt of the authority of the Circuit Court of Appeals. It will be further argued that even if his conduct did constitute misbehavior, nevertheless it did not occur either in the presence of the Court or so near thereto as to obstruct the administration of justice, and hence, that Court did not have jurisdiction under Judicial Code, Sec. 268, 36 Stat. 1163, 28 U. S. C. 385, 28 U. S. C. A. 385, to try him summarily without the intervention of a jury.

It will be further argued that even if the foregoing arguments are invalid and petitioner was properly found guilty of a contempt of court, nevertheless, the punishment imposed upon him was erroneous in that the Court imposed both a fine and imprisonment, whereas it had authority only to impose either fine or imprisonment. Petitioner will argue also that since the Court did have jurisdiction to impose either fine or imprisonment but not both, the payment of the fine actually imposed upon him by the Court operated to satisfy the judgment and deprived the Court of further jurisdiction over him.

Lastly, it will be argued that the Court's attempt to amend its first judgment imposing both fine and imprisonment, by striking out the fine and reimposing the sentence of imprisonment, was violative of the principles of natural justice in that the amended order was filed in the absence of petitioner, without notice to him or his counsel and while the Court itself was not in session.

For all of the above reasons petitioner will argue that the judgment of the Circuit Court ought to be reversed and petitioner discharged.

ARGUMENT.

Petitioner Committed No Act of Misbehavior Constituting a Contempt of the Authority of the Court Either in Its Presence or so Near Thereto as to Obstruct the Administration of Justice.

Section 268 of the Judicial Code, 36 Stat. 1163, 28 U. S. C. sec. 385, 28 U. S. C. A. sec. 385, provides as follows:

> "The said courts shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority: Provided, That such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts."

The conversation between Bradley and Kapelski took place at 10:15 a. m. (R. 40) while the Court was not in session and was not due to convene until 10:30 (R. 40, Certificate of Clerk, Brief Appendix); it took place 100 yards away (R. 10, 12) or 50 yards away (R. 24) from the court-room in a public corridor of the court house building (R. 12). This floor of the court house building houses many other court-rooms of the District Court and the conversation took place closer to such court-rooms than to that of the Circuit Court. It did not take place in a hallway of the

court building set apart for the use of the District Court as in *Ex parte Savin*, 131 U. S. 267, 9 S. Ct. 699; nor in a Grand Jury room as in *Camarota* v. *United States*, 111 F. (2) 243 (3 Cir.); nor was it an act of violence in a court-room itself as *In re Terry*, 128 U. S. 289, 9 S. Ct. 77, or in an entryway separated from the court-room only by a cloth as in *United States* v. *Emerson*, 25 Fed. Cases 15050, 4 Cranch C. C. 188; nor did it consist of threats repeated in the presence of the Court as in *United States* v. *Carter*, 25 Fed. Cases 14740, 3 Cranch C. C. 23. It is clear, we submit, that the act, whatever its nature, did not occur "in the presence of the court."

Indeed, in the *Savin* case, supra, this Court, in holding that the attempted corruption of a witness which took place just outside the court-room was in the presence of the court, said (9 S. Ct. 702):

> "We are of opinion that, within the meaning of the statute, the court, at least when in session, is present in every part of the place set apart for its own use, and for the use of its officers, jurors, and witnesses; and misbehavior anywhere in such place is misbehavior in the presence of the court."

It would appear that the situation which presents itself in the instant case is distinguishable from the *Savin* case in at least three particulars. Here, the act took place 50 yards or 100 yards away from the court-room; there it took place "within a few feet"; secondly, the public corridor involved here had not been set apart for the use of the Circuit Court of Appeals, and was used as a general public passageway as well as by those having business in the various court-rooms of the District Court. Presumably in the *Savin* case, the District Court of the United States was the only court which sat in the court house building in which the attempted bribery of the witness took place.

Thirdly, this Court, in the *Savin* case, held only that the presence of the District Court extended to a few feet outside of the court-room when it was in session. Certainly, it would not be seriously contended that here the Circuit Court of Appeals was present in that public corridor when it was not in session in the court-room itself.

The question arises—assuming, but not conceding, that it was a contempt of the authority of the court,—Did it take place "so near thereto as to obstruct the administration of justice."

In *Nye* v. *United States*, 313 U. S. 48, 61 S. Ct. 815, this Court said that these words must be given a geographical and not a causal connotation. Hence, it is an obstruction produced by the geographical contiguity of an act that is the essential element and not the result which follows as a matter of proximate causation. As pointed out in the Dissenting Opinion, the *Nye* case holds, in principle, that the "surreptitious tampering with witnesses, jurors or parties in the presence of the court, although unknown to it, would be summarily punishable because in its presence, but that if it took place outside the court-room or while the witness, juror or party was on his way to attend court it would not be [summarily] punishable, because geographical nearness is not an element in making the contemptuous action an obstruction of justice" 313 U. S. at 54, 61 S. Ct. at 818.

In the *Nye* case, as stated in the Opinion of the Court (313 U. S. at 50, 61 S. Ct. at 816), the Court was not stating the permissible constitutional limits of the contempt power but was concerned only in interpreting the Act of Congress. The distinction was made by the Act, this Court did not create it. Indeed, the opinion of the Court stated no new principle but merely brought its own decisions, as well as the decisions of other federal courts, back to the

clear and convincing statement of this Court in *Ex parte Robinson*, 19 Wall. 505, 86 U. S. 205. Nothing stated in *Ex parte Savin, supra*, is in conflict with this view, for in that case this Court did not attempt to determine whether the contemptuous conduct of Savin "was so near to its presence" as to obstruct justice, but decided merely that the contemptuous conduct occurred "in its presence."

It must not be forgotten that the condemned conduct must "obstruct the administration of justice." An act which proximately results in obstruction is not enough, the act itself must obstruct: *Nye* v. *United States, supra.* The case of *Toledo Newspaper Co.* v. *United States*, 247 U. S. 402, 38 S. Ct. 560, 62 L. Ed. 1186, which gave a causal connotation to the statute, is no longer law. Bradley's conduct—so far as it involved the summary power of the court to punish it—was complete at the time he spoke to Kapelski. The conduct of the latter on the next day, whether resulting from Bradley's act or not, was of no legal consequence.

The true rule seems to be that where misbehavior occurs in the presence of the court it is summarily punishable whether it immediately obstructs the administration of justice or not; but if it takes place "near" the court the misbehavior itself must be an actual obstruction.

In *Ex parte Robinson, supra*, this Court summed up the Statute as follows:

> "As thus seen, the power of these courts in the punishments of contempts can only be exercised to insure order and decorum in their presence, to secure faithfulness on the part of their officers in their official transactions, and to enforce obedience to their lawful orders, judgments and processes."

Thus it is seen that though the misbehavior may occur in the vicinity of the court the effect of the misbehavior itself as distinguished from conduct resulting therefrom must be

felt in the court-room. In the *Nye* case, *supra*, the Court said of the contemptuous act under discussion:

> "The fact that in purpose and effect there was an obstruction in the administration of justice did not bring the condemned conduct within the vicinity of the court in any normal meaning of the term. It was not misbehavior in the vicinity of the court disrupting to quiet and order or actually interrupting the court in the conduct of its business."

In *Wimberley* v. *United States*, 119 F. (2) 713, (5 Cir.), the Court, speaking of the *Nye* case, says, p. 714:

> "The gist of the decision is that if the misconduct does not disrupt quiet and order or actually interrupt the court in the conduct of its business the offender may not be summarily punished for contempt."

See also: *Millinocket Theatre Inc.* v. *Kurson, et al.*, 39 F. Supp. 979, D. C. Maine; *Waring* v. *Colpoys*, 122 F. (2) 470 (App. D. C.); *McKee* v. *U. S.*, 126 F. (2) 470 (6 Cir.). Since this Court now has before it on Certiorari the case of *Pendergast* v. *U. S.*, October Term, 1942, No. 183, no attempt will be made to analyze that case.

In the *Nye* case, the misbehavior occurred about 100 miles from the court.

The *Wimberley* case involved an attempt to influence a juror at his home 60 miles from the court one day before the juror was to begin his term of service.

The *Millinocket* case involved the destruction of business records in the office of one of the parties.

The *Warring* case involved the corruption and attempted corruption of jurors some days before the trial and some distance from the court house, although within the district.

The *McKee* case involved an attempt to influence a bailiff and a petit juror in the anteroom of the county jail two or three blocks from the court house.

It would appear, therefore, that the facts in each of the above cases are different but the principle upon which they were decided applies equally in the instant case. In all of them the distance from the court-room where the act occurred was not an element in producing an obstruction of justice. In the instant case, since the Court was not in session at the time the conversation between Bradley and Kapelski took place, that conversation itself could not and did not obstruct the Court in the performance of its duties. Furthermore, the inadequate or false testimony of Kapelski, even though resulting from that conversation, took place the next day. Thus, the place where the conversation occurred was not an element in producing or causing an obstruction of justice. Had the conversation taken place anywhere else the result would have been the same. The limitation upon the court's power to punish contempts committed in its presence or so near thereto as to obstruct the administration of justice requires the construction contended for here.

Mr. Justice Holmes, dissenting in the *Toledo Newspaper* case, supra, although he did not insist upon a spatial construction of the words "so near thereto", did say:

> "When it is considered how contrary it is to our practice and ways of thinking for the same person to be accuser and sole judge in a matter which if he be sensitive, may involve strong personal feeling, I should expect the power to be limited by the necessities of the case to insure order and decorum in their presence as it is stated in Ex parte Robinson, 19 Wall. 505, 22 L. ed. 205. See Prynne, Plea for the Lords, 309, cited in McIlwain, The High Court of Parliament and its Supremacy, 191. And when the words of the statute are read it seems to me that the limit is too plain to be construed away." 247 U. S. 402, 38 S. Ct. 560 at 565.

How can a conversation between two men, taking place in a public corridor one hundred yards away from the court-

room, while the court was not in session and the judges not upon the bench, disrupt quiet and order or actually interrupt the court in the conduct of its business? It could do it only by causing some later act which does take place in the presence of the court and actually obstructs justice. Such proximate causation is not enough.

The Findings and the Evidence Do Not Bring the Case Within the Statute.

Petitioner was presumed to be innocent and it was therefore essential that the court find him guilty of criminal contempt only if it found all essential elements to have been proved beyond a reasonable doubt. This principle is applicable to criminal contempts: *Michaelson* v. *United States*, 266 U. S. 42, 45 S. Ct. 18, 69 L. Ed. 162, 39 A. L. R. 451; *Gompers* v. *Bucks Stove & R. Co.*, 221 U. S. 418, 31 S. Ct. 492. This is so despite the fact that defendant is not entitled to a jury trial within the provisions of the Sixth Amendment: *Myers* v. *United States*, 264 U. S. 95, 44 S. Ct. 272.

The specific findings of the court show that this was not done. It may be that a judgment itself imports the proper findings, yet where the findings, as stated, show affirmatively that the essential findings were not made the court is without jurisdiction to impose judgment of sentence.

The Order and Judgment of September 28th, 1942, shows that the Court "now finds that. * * *" (R. 69):

(a) The court was not in session (R. 70);

(b) The misbehavior took place outside of the courtroom (R. 70);

(c) Kapelski was not under subpoena (R. 70);

(d) Bradley intended to and did intimidate Kapelski (R. 70);

(e) As a result Kapelski gave perjured testimony (R. 70).

It is clear, therefore, that the Court did not find as a fact that Bradley's conversation with Kapelski obstructed justice or that it disturbed quiet and order or that it actually interrupted the court in the conduct of its business—elements said by this Court to be essential in *Nye* v. *United States*, 313 U. S. at 52, 61 S. Ct. at 817. It would appear that the court below squarely rested its judgment upon the rejected doctrine of proximate causation stated in *Toledo Newspaper Co.* v. *United States*, 247 U. S. 402, 38 S. Ct. 560. For the conversation between Bradley and Kapelski took place at 10:15 a. m. on September 14th but the alleged perjured testimony given by Kapelski, as the result thereof, was given some time on September 15th. Thus the court has not found that Bradley's act itself obstructed the court in the conduct of its business nor indeed has it even found specifically that such obstruction resulted therefrom since perjury is not *in se* such construction: *Ex parte Hudgings*, 249 U. S. 378, 39 S. Ct. 337, 63 L. Ed. 656.

Apart from the findings, however, we contend that the evidence is legally insufficient as a matter of law to support the jurisdiction of the court to impose sentence. This Court may look at the evidence to resolve this question: *In re Watts*, 190 U. S. 1, 23 S. Ct. 718, 47 L. Ed. 933; *Ex parte Craig* (Hough, J.), 282 F. 138, 154 (2 Cir.).

From the evidence of the prosecution itself it appears:

(a) The conversation between Bradley and Kapelski took place fifteen minutes before the court came upon the bench (Certificate of Clerk, Brief Appendix), not in the court-room or in a place set apart for the use of the court but in a public corridor along which there were court-rooms and facilities of another court (R. 8, 10, 12).

(b) Kapelski was coming to the court-room voluntarily and not under subpoena and Bradley knew this (R. 8).

(c) Bradley made no direct and unequivocal threat. At its worst the language used by him could be said to be ambiguous. In such circumstances the governing factor is the intent with which the language was used. It is clear that if ambiguous language is susceptible of two meanings, one consistent with guilt and the other consistent with innocence, the latter meaning must be adopted. When it is remembered that Bradley's words were addressed to Kapelski in the presence of Josendale, who was a company official, it is unthinkable that he could have meant thereby to threaten the witness. The language used is not susceptible of the interpretation given it by the court. We all know that where words are used figuratively—even slang or vulgarity—the figurative meaning usually bears a close resemblance to the literal one. Thus it is seen that upon any reasonable interpretation the words used by Bradley suggest no context of violence or threats or intimidation but merely that the other side, to whom he was addressing his remarks, would lose the case. The prosecution urges that the words used are susceptible of the meaning given them by the court, that is, that they constitute a threat but who is the judge of that? This is not a matter within the court's expertise and the best informed opinion on the subject, as shown by the record, is that of Kapelski himself who says that he did not construe them to be a threat, and of Bradley who joined him in that construction. The prosecution did not ask Josendale to place any construction upon the words used. It seems to us that the court cannot disregard the interpretation put upon the words by the actors themselves and substitute its own where the words are at least ambiguous and no independent evidence in the record supports the

court's construction. That the words are susceptible of the meaning given them by the court is not enough for if mere susceptibility were the test the presumption of innocence and the burden of proof beyond a reasonable doubt would be hollow words indeed. Where, as here, the intent with which the words are uttered is the controlling feature, and that intent must be gathered from the circumstances, it follows that where the circumstances are consistent with innocence that hypothesis must be adopted. This argument is not destroyed by the suggestion that Kapelski came to court intending to testify to Garrison's inefficiency and after meeting Bradley testified differently. Such discrepancy as does exist could just as well be laid at the door of Garrison himself for Kapelski talked to him prior to testifying (R. 53). When Kapelski's testimony is analyzed, however, it is seen that there is no real discrepancy at all. On the first day he testified that Garrison had probably been discharged because he was an extra man and that as of October 29, 1940, all crews were reduced and the company would maintain only the "best" men (R. 55). This is obviously a statement by Kapelski that Garrison was not one of the best men. On the second day the only change he made in this, although pressed by the Court and counsel, was that he considered Garrison's work unsatisfactory although he was unable to point to any particular respect in which it was unsatisfactory (R. 65, 66) and that he had previously told Josendale that he considered Garrison "unfit for any position in the company" (R. 64). In the light of his former testimony that Garrison was merely an extra man, as he at all times insisted, and that only the best men were kept on October 29, 1940, it certainly would appear that there was no major contradiction in his testimony. Had he on the first day categorically denied making this statement to Josendale a different

situation would be presented. Even the court itself suggested that perhaps he had not fully understood the nature of the questioning on the first day (R. 60).

Can the Court find as a fact, beyond a reasonable doubt, against all the evidence, both for the prosecution and defense, and the surrounding circumstances, that vulgar language, having no well-defined meaning, which is at its very worst ambiguous, constitutes a threat? We submit not.

The further proposition remains—to our mind serious—that even granting Bradley's conduct constituted misbehavior it constituted no contempt of the *authority* of the court. Section 268 of the Judicial Code, *supra*, says:

> "The said courts shall have power * * * to punish * * * contempts of their authority * * *".

It is seen, therefore, that this statute, being one of limitation: *Ex Parte Robinson*, 19 Wall. 505, 86 U. S. 205; *Nye v. United States*, 313 U. S. 33, 61 S. Ct. 810, restricts the court to punish only misbehavior which constitutes a contempt of its authority. Mere misbehavior or even criminal conduct does not warrant the exercise of the summary power of the court. The Court had not issued any process whatever to either Bradley or Kapelski; consequently, prior to the actual appearance of either of them in court, it had no authority over them. Neither of them was an officer of the court, nor a party to the proceedings; either of them could have remained away from court for the worst possible motives and still have been beyond the reach of summary punishment, for it must be remembered that Sec. 268 of the Judicial Code only authorizes summary punishment of a witness for disobedience or resistance "to any lawful writ, process, order, rule, decree or command of the said courts." In saying this we do not, of course, contend that one who tampers with a prospective witness would be beyond the reach of a criminal indictment under sec. 135

of the Criminal Code, 35 Stat. 1113, 18 U. S. C. A. 241;[1] we merely say that in limiting the summary power of a court to the punishment of contempts of its authority the statute means precisely what it says.

In *Baldwin* v. *Franks*, 120 U. S. 678, 692, 7 S. Ct. 656, 30 L. Ed. 766, this Court construed a statute which condemned conduct in defiance of the "authority" of the United States. There it was held that to come within the scope of the statute the conduct must be more than a violation of law; it must be an act against the affirmative exercise of the authority of the Government. It must be an act against the Government as a Government. In a court, litigants have the undoubted right to justice and any intentional act interfering with that right is and ought to be punished. But to call the summary contempt power into operation the act must not be a mere wrong to a litigant; it must be a defiance of the court *qua* court. There must be more than an interference with the court's general "authority" to administer justice; there must be an interference with the affirmative specific exercise of that authority by an act which itself obstructs the court in performing its function.

In *Ex parte Savin*, 131 U. S. 267, 9 S. Ct. 699, relied upon by the prosecution, this Court, in sustaining summary punishment for an attempted bribery of a witness, repeat-

[1] "Whoever corruptly, or by threats or force, or by any threatening letter or communication, shall endeavor to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or officer acting as such commissioner, or any ground or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or officer acting as such commissioner, in the discharge of his duty; or who corruptly or by threats or force, or by any threatening letter or communication, shall influence, obstruct, or impede, or endeavor to influence, obstruct, or impede, the due administration of justice therein, shall be fined not more than $1,000, or imprisoned not more than one year, or both."

edly emphasized that the witness was in attendance upon the court under subpoena. The "authority" of the court had been called into operation with respect to that witness, and any attempt to corrupt him was an attack upon the authority of the court and a punishable contempt, if otherwise within the limitations prescribed by the statute. In *Cuddy, Petitioner*, 131 U. S. 280, 9 S. Ct. 703, Cuddy attempted to influence a juror who although not impanelled in the particular case was nevertheless under the authority of the court. In the present case the court found that Bradley sought to induce Kapelski—not to violate a subpoena or an order of court but—to commit perjury. But perjury in itself is not a contempt of court: *Ex parte Hudgings, supra.*

The court does not, under this statute, have a general power by summary action to prevent violations of law or obstructions to justice but only such obstructions as constitute a contempt of the court's authority. All other obstructions are left to the ordinary procedure applicable to criminal cases.

The Sentence of September 28th Imposing Fine and Imprisonment Was Erroneous.

By Judicial Code, sec. 268, *supra*, it is provided that:

> "The said courts shall have power to * * * punish, by fine or imprisonment, at the discretion of the court, contempts of their authority."

Under the law, therefore, the alternative was given to the court either to impose a fine or to imprison; it could not do both.

The Circuit Court of Appeals on September 28th sentenced petitioner to "be imprisoned for the period of six months and pay a fine of $500.00 and stand committed until the sentence is complied with" (R. 40). The fine, there-

fore, was not merely collectible from the property of petitioner but the Marshal was directed to and did take him into custody until satisfaction of both aspects of the sentence.

Speaking of the earlier contempt statute, as provided in the Judiciary Act of 1789, this Court, in *Ex parte Robinson*, 19 Wall. 505, 512, 86 U. S. 205, 208, where the District Court exceeded its right to impose only fine or imprisonment by entering an order of disbarment of an attorney, said:

> "The law happily prescribes the punishment which the court can impose for contempts. The 17th section of the Judiciary Act of 1789, 1 Stat. at L., 73, declares that the court shall have power to punish contempts of their authority in any cause or hearing before them, by fine or imprisonment, at their discretion. The enactment is a limitation upon the manner in which the power shall be exercised, and must be held to be a negation of all other modes of punishment."

That a sentence of fine *and* imprisonment where the statutory authority to impose punishment provides only for fine *or* imprisonment is illegal although not entirely void, is shown by the decision of this Court in *Ex parte Lange*, 18 Wall. 163 at 174, 21 L. Ed. 872 at 878. See also: *United States* v. *Pridgeon*, 153 U. S. 48, 14 S. Ct. 746, 751. In the *Lange* case this Court said:

> "The judgment first rendered, though erroneous, was not absolutely void. It was rendered by a court which had jurisdiction of the party and of the offense, on a valid verdict. The error of the court in imposing the two punishments mentioned in the statute when it had the alternative of only one of them, did not make the judgment wholly void."

That case involved a violation of a criminal statute against stealing mail bags of the Post Office Department.

That the same principle applies to the statutory right of the court to punish for contempt is shown by: *Wilson* v. *United States*, 26 F. (2d) 215; *Moss* v. *United States*, 23 Appeal Cases, D. of C., 485; *Clark* v. *United States*, 61 F. (2d) 695, 709, C. C. A. 8.

The Jurisdiction of the Court Over the Case was Exhausted Upon Payment of the Fine.

On October 1st, 1942, prior to 11 o'clock a. m. (Certificate of Clerk, Brief Appendix) petitioner, through his counsel, paid the $500 fine to the Clerk of the Circuit Court of Appeals. This payment was entered upon the docket by the Clerk (R. 2). The Clerk was the proper person to receive the payment on behalf of the United States: *Ex parte Lange, supra; In re Fletcher*, 107 F. (2d) 666, 668. On the afternoon of the same day the Circuit Court entered its order amending sentence (R. 2, 70, Certificate of Clerk, Brief Appendix). By that Order the court sought to delete the sentence that Bradley pay the $500 fine but resentenced him to six months imprisonment.

We now contend that by payment of the fine in satisfaction of one of the alternative modes of punishment prescribed by the statute the petitioner was not subject to the further order of the court in that the jurisdiction of the court over him had ceased.

As shown above, the court could not legally impose both punishments but it did have the jurisdiction to impose either one. It therefore follows that a satisfaction of either one which the court had jurisdiction to impose renders the other alternative excessive and in consequence void. We contend that had petitioner endured imprisonment for six months he would have been entitled to his discharge, in that he could not have been held for additional compliance with the fine which had been imposed. For the same rea-

son, having satisfied that part of the judgment imposing fine, he was and is entitled to be discharged because he cannot be compelled to serve the term of imprisonment.

The case of *Ex parte Lange*, supra, is conclusive on the present question. There it was held that a judgment of a court that had been executed so far as to be in full satisfaction of one of the alternative penalties of the law, put an end to the power of the court over the offense. There, as here, the court had imposed fine and imprisonment when it had authority only to fine or imprison; there, as here, defendant paid the fine; there the court vacated its original order and brought the defendant before it for re-sentence; here the court did not even do that but simply filed its "Order Amending Judgment"; there this Court held that the original judgment of sentence was erroneous but that the second one was void and the defendant was discharged upon habeas corpus.

See also: *Moss v. United States*, 23 Appeal Cases, District of Columbia, p. 485; *People ex rel. Maglori v. Siman*, 284 Ill. 28.

In *Re Swan*, 150 U. S. 637, 14 S. Ct. 225, it was erroneously ordered by a Circuit Court in a contempt case that defendant be sentenced to imprisonment until restoration of certain goods unlawfully seized and upon such restoration then to three months imprisonment and until payment of costs. On habeas corpus this Court held that petitioner was not entitled to discharge in that he had not suffered any of the alternative punishments provided by statute and that "he cannot be discharged on habeas corpus until he has performed so much of the judgment, or served out so much of the sentence, as it was within the power of the court to impose. *Ex parte Lange*, 18 Wall. 163; *Ex parte Parks*, 93 U. S. 18."

In *Hill, Warden* v. *United States ex rel. Wampler*, 298 U. S. 460, 464, 56 S. Ct. 760, 762, it is said that the sentence is

the judgment and that if the entry is inaccurate there is a remedy by motion to correct it to the end that it may speak the truth. That case, however, is no authority for the proposition that where a judgment of sentence is pronounced an execution of it has begun the terms of the judgment itself may be altered. The proposition for which that case stands, so far as it is relevant to the present argument, is merely that the court can correct an error in its own records to the end that those records may speak the truth as to the judgment pronounced. Here there is—and can be—no contention that the record of the court as of September 28th improperly states the judgment of the court. The record showing the imposition of fine and imprisonment was correct because that is exactly the judgment that was pronounced orally (R. 40) and signed by the Court and intended to be entered into the records (R. 69).

The case of *United States* v. *Benz*, 282 U. S. 304, 51 S. Ct. 113, is no authority for the action of the court in the present case. There it is true the defendant had commenced upon service of the sentence imposed and the court diminished that sentence by subsequent order made within the term. Two distinctions, however, at once appear. First: Such subsequent order was granted on the petition of the defendant himself; Second: the defendant had not fully satisfied one of the alternative punishments which the court had the power to impose.

The following statement in *Ex parte Lange* is particularly apt, (18 Wall. at 176, 85 U. S. at 879):

> "The record of the court's proceedings, at the moment the second sentence was rendered, showed in that very case and for that very offense the prisoner had fully performed, completed and endured one of the alternative punishments which the law prescribed for that offense, and had suffered five days imprisonment

or account of the other. It thus showed the court that its power to punish for that offense was at an end."

The only possible distinction between the *Lange* case and the present that may be raised by the prosecution is that there the fine, which was paid to the Clerk, was by him paid into the Treasury and hence it was beyond the power of the Court to recall it, whereas here the record does not show such to be the case. But the very Court in which this proceeding arose, i.e., the Circuit Court of Appeals for the Third Circuit, has held this difference to be of no consequence. In *Yavorsky* v. *United States*, 1 F. (2d) 169, that Court reversed the District Court on an appeal in a habeas corpus proceeding where the District Court had not discharged relator where the facts were identical with those in the present case. That Court said (p. 171):

> "After the fine was paid, whether the money representing it was held, during the five days defendant was in jail, by the marshal only, or by the marshal part of the time and by the clerk part of the time, or by the marshal, clerk, and the treasury of the United States, each, part of the time, was of no concern to the defendant, and had no bearing upon the suffering by him of that alternative penalty. When he had fully complied with that part of the sentence, he had as fully suffered that alternative punishment as if the fine had forthwith been deposited into the treasury of the United States by the marshal. The court was without power to remit the fine after the punishment imposed had been suffered, and the writ of habeas corpus should have been allowed, and the prisoner discharged."

If the arguments made above are valid then it is immaterial that the "Order and Judgment" entered on October 1st, was void for other reasons. However, the entry of this order in the manner in which it was entered raises fundamental questions of criminal procedure in at least two respects which should be presented to the Court.

The "Order Amending Judgment" Was Void.

A. It was entered in the absence of Petitioner.

The order of October 1st, 1942, purporting to amend the sentence imposed on September 28th, 1942, was not entered in open court but merely filed with the Clerk in the absence of petitioner and his counsel (Certificate of Clerk, Brief Appendix); without notice to petitioner or his counsel and while petitioner was effectually prevented from being present by the previous sentence of the court. It is our contention that although the sentence of September 28th, 1942, was illegal and erroneous, this order of October 1st is utterly void. It is a fundamental right of defendant, under the due process of law provisions of our Constitution, to be present at all stages of the proceeding, including the imposition of sentence: *Hopt* v. *Utah*, 110 U. S. 574, 579, 4 S. Ct. 202. This Court is confronted here with no mere omission of the traditional formalities—usually attendant upon imposition of sentence—sufficient to justify reversal in capital cases: *Ball* v. *United States*, 140 U. S. 118, 129, 11 S. Ct. 761. Of course, it has been held that in misdemeanors it is not necessary for the court to ask the defendant if he has anything to say why sentence should not be pronounced against him: *Turner* v. *United States*, 66 F. 287; *United States* v. *Austin Gagley Corporation*, 31 F. (2d) 229. But this record shows that petitioner was prevented from asserting his fundamental right to be present and to be heard on a matter affecting his personal liberty. The silence of the record is one thing; the positive denial of the right in any case where the facts must be established by testimony, whether civil, criminal or *sui generis* is quite another. Had he been present with his counsel he could have argued against this Order in that:

(a) The fine imposed by the sentence of September 28th had been paid, thus exhausting the further power of the court.

(b) The Amended Order illegally increases the term of imprisonment.

In *Windsor* v. *McVeigh*, 93 U. S. 274, 23 L. Ed. 914, it is said:

> "Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal."

The substance of a sentence of imprisonment is that part of it which prescribes the kind and amount of the punishment and the defendant must be present when it is imposed: 24 C. J. S. 74; *Anderson* v. *Denver*, 265 Fed. 3 (C. C. A. Kansas). These elements of it the court cannot change in the absence of the defendant or where jurisdiction has ceased by the expiration of the term or by the sentence going into execution: *Fels* v. *Snook, Warden*, 30 F. (2d) 187; *Hogan* v. *Hill*, 9 Fed. Supp. 333; Ex parte Waterman, 33 Fed. 29; 24 C. J. S. 1591. Of course it is conceded that since the place of punishment or time of execution are not strictly speaking part of the sentence it is not necessary that accused should be present when a change is made in them: *Schwab* v. *Bergren*, 143 U. S. 442, 12 S. Ct. 525, 36 L. Ed. 218.

In *United States ex rel. Coleman* v. *Coxe*, 47 F. (2d) 988, 990 (5 Cir.), it is said that no final action can be taken in a criminal case against a defendant while he is being detained

from the court by action of the Government. Irrespective of the question as to whether a contempt proceeding is a criminal case within the meaning of the Sixth Amendment guaranteeing jury trial which this Court said it was not: *Myers* v. *United States*, 264 U. S. 95, 104, 105, 44 S. Ct. 272, 273, 69 L. Ed. 577, it, nevertheless, partakes of the nature of a criminal case to the extent that defendant is presumed to be innocent, is entitled to be confronted by witnesses against him and to be convicted only if the evidence establishes his guilt beyond a reasonable doubt: *Gompers* v. *United States*, 233 U. S. 604, 34 S. Ct. 693, 59 L. Ed. 1115; *Michaelson* v. *United States*, 266 U. S. 42, 45 S. Ct. 18, 69 L. Ed. 162, 35 A. L. R. 451.

But even in non-criminal cases there must be notice and opportunity to be heard. Although this Court in *Blackmer* v. *United States*, 284 U. S. 421, 52 S. Ct. 252, sustained the right of the Supreme Court of the District of Columbia, under a special statute, to proceed to judgment in the absence of a recalcitrant witness, it was pointed out that all the constitutional guarantees as to notice and opportunity to defend had been given. It was there said (284 U. S. at 438, 52 S. Ct. at 255):

> "for the exercise of judicial jurisdiction in personam, there must be due process, which requires appropriate notice of the judicial action and an opportunity to be heard."

Had the first sentence been void the court could have set it aside, brought the defendant before it and pronounced a valid sentence even though the execution of the void sentence had commenced: *Tinkoff* v. *United States*, 86 F. (2d) 868, 880; *King* v. *United States*, 98 F. (2d) 291, 69 Appeals, District of Columbia, 10. But since the first sentence was merely erroneous the Court could not set it aside and pronounce a new sentence: *Ex parte Lange*, *supra*; *Spivey* v. *McGilvray*, 84 P. (2d) 256 (Cal.).

A sentence imposed by a federal court on a prisoner in his absence, although he was present when the original sentence was pronounced, is void: *Price* v. *Zerbst*, 268 F. (2d) 72 (Georgia).

It is said in *Fisher* v. *Hayes*, 6 F. 63, 68:

> "It is well settled that contempt of court is a specific criminal offense, and that the imposition of a fine for a contempt is a judgment in a criminal case. New Orleans v. Steamship Company, 20 Wall. 387, 392."

The case of *In re Terry*, 128 U. S. 289, 9 S. Ct. 77, does not contradict the rule stated above, indeed, it recognizes it fully. In that case, however, a contempt was committed in the presence of the court which had full knowledge of the facts and thus was under no obligation to inform itself by testimony or otherwise and when the defendant fled the court-room this Court held that jurisdiction to vindicate its dignity did not depart along with him. In that case he had no right to notice or opportunity to defend.

B. The "Order Amending Judgment" illegally attempted to increase a sentence which was fully satisfied or at least partly satisfied.

The sentence imposed on September 28th, 1942, was that the defendant "be imprisoned for the period of six months and pay a fine of $500 and stand committed until the sentence is complied with. It is further ordered that the United States Marshal for the Eastern District of Pennsylvania shall forthwith execute this judgment" (R. 40, 69).

The Marshal took petitioner into custody and incarcerated him in the Philadelphia County Prison where he remained at all times until October 7th, 1942, when he was removed to the County Prison of Berks County in the City of Reading, Pennsylvania, and he remained in that Prison up to the filing of the petition and until his release on bail.

It is seen, therefore, that petitioner entered upon the

execution of that sentence on September 28th, 1942. On October 1st, 1942, the court entered a new Order (R. 70) purporting to amend its original Order. A certified copy of that re-sentence was transmitted to the United States Marshal on October 1st, 1942 (R. 2). Thus it is seen that the re-sentence dates from October 1st, 1942, and that the six months imprisonment is to be computed from said date for the court said, "It is by the court *now* ordered and adjudged that the said William V. Bradley be imprisoned for the period of six months" (R. 71). This Order, although purporting to amend a former one, was under its own terms purely prospective and in no sense retrospective.

It is obvious, therefore, that the Order of October 1st imposes upon petitioner an additional term of imprisonment of three days. This is beyond the power of the Court even though done within the term in which the original judgment was entered; it constitutes a violation of the double jeopardy provision of the Fifth Amendment: *Ex parte Lange, supra.*

In *United States* v. *Benz*, 282 U. S. 304, 306, 51 S. Ct. 113, 114, the Court held:

(a) Judgments, decrees and orders are within the control of the court during the term at which they were made;

(b) This rule does not authorize increasing a sentence which has been partly executed.

The sentence of September 28th was not void but merely erroneous: *Ex parte Lange*, 18 Wall. 163, 21 L. Ed. 872; *People* v. *Connelly*, 27 Cal. A. 372, 150 P. 412; *State* v. *Addy*, 43 N. J. L. 113, 39 Am. R. 547; hence the "Order and Judgment" of October 1st could not be looked upon as the attempted substitution of a valid judgment for a void one.

The general rule is stated to be that where defendant has begun or has completed a valid sentence it is ordinarily

beyond the power of the trial court to set it aside and render a new sentence. This is so even during the term at which the sentence was rendered: *Simmons* v. *United States*, 89 F. (2d) 591 (C. C. A. Texas); *Cisson* v. *United States*, 37 F. (2d) 330 (C. C. A. S. Car.); *Hynes* v. *United States*, 35 F. (2d) 734, 735 (C. C. A. Ill.); *Yavorsky* v. *United States*, 1 F. (2d) 169 (C. C. A. Penna.). See cases cited: *Buhler* v. *Hill*, 7 F. Supp. 857 (D. C. Penna.); *Kidwell* v. *Zerbst*, 19 F. Supp. 475 (D. C. Ga.). See generally: 24 C. J. S. 1589a.

Conclusion.

It is respectfully submitted that the Circuit Court of Appeals for the Third Circuit had no jurisdiction to try petitioner summarily for a contempt of its authority and that in consequence thereof the imposition of any sentence upon him was erroneous; that in any event the imposition upon him of a sentence of fine and imprisonment, where the statute confers jurisdiction to punish only by fine or imprisonment, was erroneous and satisfaction of such sentence by payment of the fine acted in full satisfaction of one of the alternative modes of punishment the court had jurisdiction to impose; and that the said judgment should be reversed and the petitioner discharged.

Respectfully submitted,

THOMAS D. MCBRIDE,
702 Liberty Trust Building,
Philadelphia, Pennsylvania,
Attorney for Petitioner.

APPENDIX.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 8140

In re WILLIAM V. BRADLEY.

(Original—Criminal Contempt.)

I, William P. Rowland, Clerk of the United States Circuit Court of Appeals for the Third Circuit, hereby certify that the United States Circuit Court of Appeals for the Third Circuit convened at 10.30 a. m., on Monday, September 14, 1942, for the purpose of hearing testimony in the case of National Labor Relations Board, petitioner, *vs.* Delaware-New Jersey Ferry Co., respondent (No. 7850, October Term, 1941), pursuant to a rule to show cause why respondent should not be adjudged in contempt for failure to comply with the decree of the said court, out of which proceeding the above-captioned cause arose.

I further certify that on October 1, 1942, prior to eleven o'clock in the morning, Timothy J. McElroy, one of the attorneys for William V. Bradley, came into my office and paid to me in cash the sum of five hundred dollars ($500.00) to satisfy that part of the judgment of the United States Circuit Court of Appeals for the Third Circuit which imposed a fine in that amount upon the said William V. Bradley.

I further certify that in the afternoon of October 1, 1942, several hours after the said fine was paid and entry of the said payment had been made on the court docket, I received from the said court an order amending the judgment or sentence theretofore entered in the above captioned cause, by directing the elimination of the fine of five hundred dollars, but reimposing the sentence of six month imprisonment.

The United States Circuit Court of Appeals for the Third Circuit was not in session on October 1, 1942.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 25th day of November, 1942.

[SEAL.]

WM. P. ROWLAND,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

IN THE

Supreme Court of the United States

October Term, 1942.

No. 473.

In re **WILLIAM V. BRADLEY,**

Petitioner.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Supplemental Brief for Petitioner.

THOMAS D. McBRIDE,
Attorney for Petitioner.

International, 236 Chestnut St., Philadelphia

IN THE

Supreme Court of the United States.

No. 473. October Term, 1942.

IN RE WILLIAM V. BRADLEY,

Petitioner.

SUPPLEMENTAL BRIEF FOR PETITIONER.

Supplemental Argument.

At the oral argument it was suggested that petitioner cannot maintain that he has satisfied the judgment of the court below and that he is also entitled to be heard upon the legality of his conviction. Only in a restricted sense does this contention have any merit. Even if by satisfying the judgment he could be said to have waived his contention that the evidence was insufficient to show misbehavior, nevertheless, it would seem clear that he is not thereby estopped to contend that the court below lacked power to try the case summarily. Section 268 of the Judicial Code, 36 Stat. 1163, 28 U. S. C. A. 385, after providing that courts shall have power to punish contempts of their authority, places a limitation upon the exercise of such summary power as follows:

> "Provided that such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice . . ."

This is clearly a limitation upon the power of the court to summarily adjudicate. It is not a mere provision intended for the convenience of litigants which they may waive but is rather a fundamental prohibition upon the jurisdiction of the court itself. It follows, therefore, that if misbehavior does not occur in the presence of the court, or so near thereto as to obstruct the administration of justice, the court is forbidden by the statute to summarily punish it. Petitioner contends that this case does not fall within the class of cases punishable by summary action. Hence, petitioner's payment of the fine in satisfaction of a judgment which was beyond the power of the court to impose does not make valid that which for want of power was invalid. Although a litigant may confer upon the court jurisdiction of his person he cannot confer upon the court jurisdiction of the subject matter,[1] that is, the power to adjudicate. This power the court may acquire only by authority of law.[2]

A different rule must be applied to cases where the attack is merely upon the sufficiency of the evidence to sus-

[1] Mitchell v. Maurer, 293 U. S. 237, 244, 55 S. Ct. 162; Chi. B. & Q. R. Co. v. Willard, 220 U. S. 413, 420, 31 S. Ct. 460, 55 L. Ed. 521; Minnesota v. Northern Securities Co., 194 U. S. 48, 62, 24 S. Ct. 598, 48 L. Ed. 870; Athan v. Hartford Fire Ins. Co., 73 F. (2d) 66, 67 (C. C. A. 2); United States v. Mayer, 235 U. S. 55, 35 S. Ct. 16.

[2] Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U. S. 165, 167, 60 S. Ct. 153, 154; Mansfield, Coldwater & Lake Michigan R. Co. v. Swan, 111 U. S. 379, 382, 4 S. Ct. 510, 28 L. Ed. 462; Oneida Navigation Corp. v. W. & S. Job & Co., 252 U. S. 521, 522, 40 S. Ct. 357, 358, 64 L. Ed. 697; Republic Supply Co. v. Richfield Oil Co., 9 Cir., 74 F. 2d 907, 908, certiorari denied Cities Service Co. v. Armsby, 296 U. S. 583, 56 S. Ct. 94, 80 L. Ed. 412; American Brake Shoe & Foundry Co. v. New York Rys. Co., 2 Cir., 282 F. 523, 527; Cleveland Cliffs Iron Co. v. Village of Kinney, 8 Cir., 266 F. 888.

tain a conviction than where the challenge is to the fundamental power of the court to adjudicate the matter. To this extent, therefore, it is submitted that petitioner may persist in the position he took in paying the fine but which his counsel failed to state in oral argument—(1) that the judgment of the court lacked legal authority, (2) that even if this Court should be of opinion that this contention is wrong and that the court's judgment, although erroneous, was not void for want of power, nevertheless, that judgment was satisfied by petitioner and that he ought to be discharged.

That this position is not an afterthought is shown by the Record. When the evidence of the prosecution disclosed a want of power to proceed summarily, petitioner moved to dismiss on the ground that the evidence did not "justify the use of the summary jurisdiction of the court to punish for contempt" (R. 27). Furthermore, when the court entered its judgment and counsel was arguing that bail be granted to operate as a supersedeas, and the court inquired as to his position in the matter, he answered (R. 42):

> "I seek to raise first, sir, that this court is without power to impose the summary judgment of sentence against this respondent for an act which was done a hundred yards away from the court at a time when the court was not in session, and particularly where the act was done, and the language was used, to a man who was not yet a witness, who was not under a subpœna or authority of this court, and by the use of language which was at the very worst ambiguous."

It was only after the court below refused bail and sent petitioner forthwith to jail that he paid the fine. We contend that such payment was not in any sense an abandon-

ment of his position or a waiver of his right to attack the jurisdiction of the court. It is respectfully submitted, therefore, that since this Court has brought this matter before it on certiorari, the evidence, so far as it relates to the power of that court to proceed to summary judgment, ought to be examined. *Mansfield C. & L. M. R. Co. v. Swan*, 111 U. S. 379, 382, 4 S. Ct. 510.

Respectfully submitted,

THOMAS D. MCBRIDE,
702 Liberty Trust Building,
Philadelphia, Pennsylvania,
Attorney for Petitioner.

FILE COPY

OCT 26 1942

No. 473

In the Supreme Court of the United States

OCTOBER TERM, 1942

IN RE WILLIAM V. BRADLEY, PETITIONER

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Statute involved	2
Statement	3
Argument	9
Conclusion	15

CITATIONS

Cases:	
Brule, In re, 71 Fed. 943	13
Davis, Ex Parte, 112 Fed. 139	10
Lange, Ex Parte, 18 Wall. 163	9
McKee v. *United States*, 126 F. (2d) 470	15
Millinockett Theatre, Inc. v. *Kurson*, 39 F. Supp. 979	13, 15
Nye v. *United States*, 313 U. S. 33	13
Pendergast v. *United States*, No. 183, this Term	15
People v. *Siman*, 284 Ill. 28	11
Robinson, Ex Parte, 19 Wall. 505	10
Savin, Petitioner, 131 U. S. 267	13, 14
United States v. *Patterson*, 26 Fed. 509	14
Warring v. *Colpoys*, 122 F. (2d) 642	15
Wilson v. *United States*, 26 F. (2d) 215	10
Wimberley v. *United States*, 119 F. (2d) 731	14, 15
Yavorsky v. *United States*, 1 F. (2d) 169	11
Statute:	
Judicial Code (28 U. S. C., 385):	
Section 268	2, 12, 13
Miscellaneous:	
Anno. 49 A. L. R. 494	11

491810—42——1

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 473

IN RE WILLIAM V. BRADLEY, PETITIONER

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINION BELOW

The circuit court of appeals did not deliver an opinion. The order and judgment containing the findings of the circuit court of appeals is printed at R. 69–70.

JURISDICTION

The order and judgment of the circuit court of appeals were entered September 28, 1942 (R. 69–70). An order amending the judgment was entered October 1, 1942 (R. 70–71). The jurisdiction of this court is invoked under the Judicial Code, Section 240 (a), as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether a circuit court of appeals, having erroneously sentenced the petitioner in a contempt

proceeding to a fine and imprisonment under a statute permitting the imposition of either punishment but not both, may amend its order to sentence the petitioner to imprisonment only, after the fine had been paid.

2. Whether in fact the petitioner was guilty of contempt of the authority of the circuit court of appeals.

3. Whether the petitioner's misbehavior was in the presence of the court or so near thereto as to obstruct the administration of justice.

STATUTE INVOLVED

Section 268 of the Judicial Code (28 U. S. C., 385), which is derived from Section 17 of the Judiciary Act of 1789 (1 Stat. 73, 83) and the Act of March 2, 1831 (4 Stat. 487), provides:

> The courts of the United States shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority. Such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts.

STATEMENT

This case arose upon an order of the Circuit Court of Appeals for the Third Circuit issued on its own motion directing the petitioner to show cause why he should not be adjudged guilty of contempt of court for endeavoring in the corridor adjoining the courtroom to intimidate a witness who was about to testify in a pending proceeding (R. 2). The material facts developed at the hearing upon the petitioner's return (R. 3) may be summarized as follows:

On September 14, 1942, about 10:30 a. m., one Kapelski came to the United States Court House in Philadelphia, Pennsylvania, to testify on behalf of the company in a civil contempt proceeding entitled *National Labor Relations Board* v. *Delaware-New Jersey Ferry Company.* At that time he was not under subpoena but had come at the request of one Josendale, a company official, upon the assurance that he could return to his work at eleven o'clock. (R. 6–7, 14, 22.) Kapelski was General Manager of the Delaware River Ferry Company. His company was not interested in the litigation but it did have a collective bargaining agreement with the union which had initiated the Labor Board proceeding, United Marine Federation Local No. 333. (R. 5, 7, 35–36.) The petitioner is the President and business manager of that union (R. 30).

On his way to testify Kapelski, who was accompanied by Josendale, entered the courthouse and went up to a corridor on the second floor which is entirely set aside for the use of the United States courts (Pet. 2). As Kapelski and Josendale proceeded along the corridor toward the courtroom of the circuit court of appeals, they met the petitioner at a point fifty (R. 24) or one hundred (R. 12) yards away from the courtroom door. According to Josendale's testimony this conversation followed (R. 24–25):

> Why, Mr. Kapelski says, "Hello, there." And, in fact, they both said the same thing in one breath—"What are you doing up here?"
>
> Captain Bradley shook hands with Mr. Kapelski and myself. Mr. Kapelski said, "I am up here with Josendale testifying against this Herbert Garrison."
>
> Captain Bradley says, "That is what I am here for, on this Ferry Company case."
>
> Mr. Kapelski says, "Well, I am testifying against Herbert Garrison." He says, "You know, I hired him, and you know I fired him; you know he is no good."
>
> Captain Bradley said, "What do you mean? You are testifying against us."
>
> Mr. Kapelski says, "Well, Mr. Josendale asked me up here and I can't do but tell the truth."
>
> Captain Bradley says, "You are"—he says, "You are going to get a damned good fucking."

Mr. Kapelski says, "Now, wait a minute; wait a minute."

Captain Bradley raised his hand. He says, "The hell with you." He turned around and walked up the corridor.

Kapelski and Bradley gave substantially the same account of the incident as Josendale (R. 8–9, 31). After it ended, Kapelski went on to the courtroom door but left about 11:30 a. m. without testifying (R. 7, 10, 14). On the two following days Kapelski was present and testified pursuant to a subpoena (R. 6, 10).

The evidence was conflicting as to whether the petitioner's remarks were intimidating. He testified that the expression used was common along the waterfront and that he intended only to say that the Delaware-New Jersey Company would lose the pending case (R. 31–33). He also testified that he had nothing to gain by threatening Kapelski (R. 33), although it was clear that his union had an indirect interest in the pending proceeding because the employees alleged to have been wrongfully discharged and not reemployed, had been union members (R. 34–36). Kapelski was a reluctant witness and gave evasive answers concerning how he had understood the petitioner's remarks (R. 15–22). He testified that he did not consider them as a threat of bodily harm (R. 15). In answer to the question whether he considered them a threat to the contract between his company and the petitioner's union, Kapelski paused but

answered "No" (R. 19, see also R. 20). But he also testified that day to day relationships with the union were of real importance to his company (R. 21–22) and that he was conscious of their importance at that time (R. 19–20). The extent to which this feeling influenced him was brought out on cross-examination (R. 16–17):

> Q. Did you in any way alter, change, or modify any testimony as the result of anything that Bradley said to you?
>
> A. (The witness did not answer.)
>
> Q. Did you understand the question, Mr. Kapelski?
>
> A. No.
>
> Q. Now, the "no" is to what—to my question?
>
> A. To your question.
>
> Q. Then I understand you to mean that you did not modify or change your testimony as the result of what Mr. Bradley told you. That is right, isn't it?
>
> A. May I answer that in—the thing is probably on the very first day, probably, I did not understand some of the questions that were asked me, and I probably was not as frank with them as I should have been. I didn't explain them all as clearly as I should have.
>
> By Judge MARIS:
>
> Q. On the first day, Mr. Kapelski, you did not indicate in any way that you were dissatisfied with the services of Herbert Garrison, did you?

A. On the first day?

Q. Your first day's testimony.

A. That is correct. If I recall——

Q. In other words, you withheld that information from the Court, did you not?

A. I withheld that, Your Honor, and I think the following day you asked me all those questions.

Q. And you frankly stated the whole situation?

A. I did, sir.

Q. Undoubtedly so. Now, isn't it a fact that your reticence on the first day was due at least in part to your conversation with Mr. Bradley?

A. It probably could have been in a sense, because I was—well, I don't know—I was more or less——

Q. You were——

A. I was confused.

Q. You were, as you said, "in the middle."

A. That is right.

The transcript of the testimony given by Kapelski on the two days in question was introduced in evidence (R. 10–12, 46–68). On September 14, Kapelski had gone to the courthouse to testify that he had discharged Garrison "because he was no good" (R. 23). Nevertheless, after meeting the petitioner in the corridor, Kapelski testified on September 15 that Garrison was discharged "for the simple reason that he was an extra man" (R. 55). On September 16, however, after being

admonished by the court, Kapelski explained that he had considered Garrison an unsatisfactory workman (R. 60–66).

After the close of the evidence the court found that the petitioner Bradley had intentionally intimidated Kapelski who was in the corridor adjoining the courtroom for the purpose of testifying in a pending proceeding, and that Kapelski was so intimidated that he gave false, perjured and incomplete testimony (R. 69–70). The court adjudged the petitioner guilty of contempt and ordered that he be imprisoned for six months and pay a fine of $500 (R. 70). A supersedeas and bail were denied and the marshal took the petitioner in custody (R. 48).

Three days later, we are informed,[1] the petitioner paid the amount of the fine to the Clerk of the circuit court of appeals (cf. R. 2). Thereafter on the same day the circuit court of appeals without a hearing issued an order amending the earlier order by striking out the sentence to pay a fine but

[1] We are informed by William P. Rowland, Clerk of the Circuit Court of Appeals for the Third Circuit, that some time on October 1, 1942, $500 in cash was paid to him in payment of the fine. Thereafter on the same day before he had deposited the money in the Clerk's account, the order amending the judgment was filed. He notified counsel for the petitioner that they were entitled to a remission of the fine, but counsel have refused to accept the money. The Clerk has not deposited the money in his Clerk's account nor has he paid it into the Treasury, but he still holds it awaiting further instructions.

leaving in force the sentence to imprisonment (R. 70–71).

On October 22, 1942, a petition for certiorari was filed and an application made for bail. The Solicitor General has not been formally served with these papers. On October 24, 1942, the Court requested the Solicitor General to file before 11 a. m., October 26, 1942, a response to the petition for certiorari, and to suggest appropriate bail in the event that bail is allowed. This memorandum is submitted in response to such request.

ARGUMENT

I

The action of the circuit court of appeals in striking from its order the provision for a fine and leaving in effect the sentence of imprisonment although the fine had been paid, probably conflicts with the decision of this Court in *Ex Parte Lange*, 18 Wall. 163. In the *Lange* case the facts were as follows: Lange was convicted for an offense punishable by a fine *or* imprisonment and was sentenced to pay a fine *and* to imprisonment. On the same day Lange was committed to jail in execution of his sentence and on the next day the fine was paid to the clerk, who paid it into the Treasury. Thereafter, the sentence was vacated and Lange was sentenced to imprisonment only. On petition for a writ of *habeas corpus* this Court

held that Lange should be released from custody. The Court said (p. 176):

> We are of opinion that when the prisoner, as in this case, by reason of a valid judgment, had fully suffered one of the alternative punishments to which alone the law subjected him, the power of the court to punish further was gone. * * * The record of the court's proceedings, at the moment the second sentence was rendered, showed that in that very case, and for that very offence, the prisoner had fully performed, completed, and endured one of the alternative punishments which the law prescribed for that offence, and had suffered five days' imprisonment on account of the other. It thus showed the court that its power to punish for that offence was at an end. * * *

The *Lange* case differs from the present controversy in one respect only. In both cases the initial sentence was excessive, for the contempt statute permits imposition of a fine or imprisonment, but not both.[2] In the *Lange* case, however, the sentencing court was powerless to restore the fine because the money had been paid into the Treasury; in this case the court below was ready to make restitution on the very day on which the fine was paid and since then has held the money for the petitioner (see p. 8, n. 1, *supra*). Conse-

[2] See *Ex Parte Robinson*, 19 Wall. 505; *Ex Parte Davis*, 112 Fed. 139 (C. C. A. 5); *Wilson v. United States*, 25 F. (2d) 215 (C. C. A. 8).

quently, it might be argued that the rationale of the *Lange* case is inapplicable here because, except for his own unwillingness to accept the money, the petitioner would have been restored substantially to his former position and therefore did not endure one of the alternative punishments.

This distinction was pressed upon the court below in *Yavorsky* v. *United States,* 1 F. (2d) 169 (C. C. A. 3), but was rejected by it in a decision squarely conflicting with its action in the instant case. Likewise, there is nothing in the *Lange* opinion to sustain the argument except a passing reference to the fact that the money had passed beyond the control of the court (p. 175). And, there appear to be numerous decisions in the state courts holding that a prisoner sentenced to a fine and imprisonment where only one is proper is entitled to his release upon payment of the fine. See *People* v. *Siman,* 284 Ill. 28; Anno. 49 A. L. R. 494. Under such circumstances any limitation upon the *Lange* case should be established by this Court. It follows that this is an appropriate case for granting a writ of certiorari.[3]

But although we believe the writ may be appropriately granted, we are not prepared, without an opportunity for more mature consideration, to suggest that the distinction noted has no signifi-

[3] Since the court below probably lacked power to issue the order amending the judgment, whether or not a hearing was held, it is unnecessary to consider whether the petitioner was entitled to notice of the proposed amendment.

cance or that the judgment below should be vacated.

II

There can be no question but that the circuit court of appeals was warranted in finding that the petitioner intentionally intimidated Kapelski for the purpose of influencing his testimony, and this question of fact plainly does not require further review by this Court. The words were susceptible of an intimidating meaning and the finding of the court below is supported by Kapelski's testimony that he withheld relevant information as a result of the encounter and by the transcript of the testimony given by Kapelski at the hearing in the Labor Board case, which showed that on the first day he had not given the information which he had come to court intending to testify.

Petitioner suggests that his misbehavior did not constitute the offense of contempt because the witness Kapelski was not under subpoena. But the fact that the intimidation is directed against a witness who appears voluntarily makes it no less contumacious of the authority of the court to discover the truth and no less dangerous to the proper administration of justice. While attempting to induce disregard for a subpoena may constitute an offense punishable as contempt, corrupting a witness is itself a separate and independent obstruction. And under Section 268 of the Judicial Code that misbehavior is not cured

of its contemptuous character by the voluntary nature of the witness' appearance. Cf. *In re Brule*, 71 Fed. 943.

It is likewise plain that this misconduct was punishable summarily under Section 268 of the Judicial Code (28 U. S. C., 385). It occurred in the building housing the court in a corridor leading to the courtroom at a time when the petitioner was leaving the courtroom and the witness Kapelski was arriving there to testify. The entire floor on this side of the courthouse is exclusively occupied by the United States courts and their facilities. We submit that in these circumstances the decision in *Savin, Petitioner*, 131 U. S. 267, is decisive of the present case and that further review is unnecessary. In that case the misconduct occurred first in the juryroom which was a few feet from the courtroom and was being used as a witness room and second *in the hallway of the court building* immediately adjoining the courtroom[4] (pp. 269, 278). The Court held that both acts of misconduct were summarily punishable under Section 268 because they were committed "in the presence of the Court". The ruling that the presence of the court extended to the hallway leading to and adjoining the court was not questioned in *Nye* v. *United States*, 313

[4] The statements to the contrary in the petitioner's brief (Pet. 13, 14) reflect a misapprehension of the facts in the *Savin* case.

U. S. 33; that case was concerned with the question whether misbehavior not in the presence of the court occurred "so near thereto" as to obstruct the administration of justice.[5]

But even if the summary punishment of the contemptuous behavior in the instant case was bottomed on the proposition that the misconduct was committed "so near" to the presence of the court as to obstruct the administration of justice, no inconsistency with the *Nye* decision is shown. Unlike the misbehavior in that case which occurred about 100 miles from the court, the misconduct in this case occurred "within the vicinity of the court and in any normal meaning of the term" (p. 52). Nor is any inconsistency shown with decisions in the lower courts since the opinion in the *Nye* case. In all of them, including *Wimberley* v. *United States*, 119 F. (2d) 731 (C. C. A. 5), and *Millinockett Theatre, Inc.* v. *Kurson*, 39

[5] The petitioner points out that the court had not yet convened at the time when he threatened Kapelski. But the parties and their witnesses were gathered to go forward with the proceeding, and only a few minutes remained (R. 40) before the hearing for which they were gathered would formally open. In the circumstances of this case, therefore, no significant distinction can be premised on the absence of a formal convocation of the court. Power of the court to protect "the place of justice" against "scandal and corruption" (*Savin, Petitioner*; *supra*, at 277) is not so limited that it is not as effective while the parties are assembling as it is after the hearing has formally begun. *United States* v. *Patterson*, 26 Fed. 509.

F. Supp. 979 (D. C. Maine),[6] cited by petitioner, the misconduct sought to be summarily punished occurred at a considerable distance from the court.[7]

CONCLUSION

For the foregoing reasons we believe that the petition for certiorari should be granted, limited to the first question presented in this memorandum.

The Court has requested that the Solicitor General recommend the amount of bail to be fixed in the event that the petitioner is admitted to

---

[6] *Wimberley* v. *United States*, *supra*, involved an attempt to influence a juror at his home 60 miles from the court two days before the court met. *Millinockett Theatre, Inc.* v. *Kurson*, *supra*, involved the destruction of business records in the office of the litigant. *Warring* v. *Colpoys*, 122 F. (2d) 642 (App. D. C.), involved the corruption and attempted corruption of jurors some days before the trial and some distance from the courthouse, although in the city in which the court sat. *McKee* v. *United States*, 126 F. (2d) 470 (C. C. A. 6), involved an attempt to influence a bailiff and a petit juror in the anteroom of the county jail which was located two or three blocks from the courthouse.

[7] The grant of certiorari in *Pendergast* v. *United States*, No. 183, this Term, does not require similar action in the instant case. If the misbehavior involved in that case is held to be summarily punishable under Section 268, the decision of the circuit court of appeals in this case will be consistent with it. If the misbehavior in that case is held not to be summarily punishable under Section 268, the decision below will not be at variance with that holding because factually the cases are entirely different.

bail. It is our recommendation that the petitioner be released upon his own recognizance.

Respectfully submitted,

OSCAR COX,
Acting Solicitor General.

ARCHIBALD COX,
Attorney.

OCTOBER 26, 1942.

U. S. GOVERNMENT PRINTING OFFICE: 1942

FILE COPY

Office - Supreme Court, U. S.
FILED
JAN 5 1943
CHARLES ELMORE CROPLEY
CLERK

No. 473

In the Supreme Court of the United States

OCTOBER TERM, 1942

IN RE WILLIAM V. BRADLEY, PETITIONER

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES

INDEX

	Page
Statement	1
Discussion	4
Conclusion	14
Appendix	15

CITATIONS

Cases:

Ainsworth v. *Sanford*, 104 F. (2d) 96	9
Anderson v. *Denver*, 265 Fed. 3	11
Ball v. *United States*, 140 U. S. 118	11, 12
Bergdoll v. *United States*, 279 Fed. 404, certiorari denied, 259 U. S. 585	5
Biddle v. *Thiele*, 11 F. (2d) 235	13
Blackmer v. *United States*, 284 U. S. 421	11
Blitz v. *United States*, 153 U. S. 308	9
Benner, In re, 151 U. S. 242	13
Bryant v. *United States*, 214 Fed. 51	13
Clark v. *United States*, 61 F. (2d) 695, 709, affirmed, 289 U. S. 1	3
Copeland v. *Archer*, 50 F. (2d) 836	13
Davis, Ex parte, 112 Fed. 139	3
D'Allessandro v. *United States*, 90 F. (2d) 640	9
DeBenque v. *United States*, 85 F. (2d) 202, certiorari denied, 298 U. S. 681	13
De Maggio v. *Coze*, 70 F. (2d) 840	9
Diaz v. *United States*, 223 U. S. 442	11, 12
Downey v. *United States*, 91 F. (2d) 223	11
Fels v. *Snook*, 30 F. (2d) 187	12
Fiske v. *Commissioners of District of Columbia*, 38 App. D. C. 120	5
Fleisher v. *United States*, 302 U. S. 218	9
Fotter v. *Zerbst*, 92 F. (2d) 950	11
Garrison v. *Reeves*, 116 F. (2d) 978	9, 13
Gilmore v. *United States*, 124 F. (2d) 537, certiorari denied 316 U. S. 661	13
Hammers v. *United Sates*, 279 Fed. 265	13
Hartwell v. *United States*, 107 F. (2d) 359	5
Hatem v. *United States*, 42 F. (2d) 40	9
Hewitt v. *United States*, 110 F. (2d) 1, certiorari denied, 310 U. S. 641	9

503687—43——1

Cases—Continued. Page

Holiday v. *Johnston*, 313 U. S. 342 13
Jackson v. *United States*, 102 Fed. 473 10
Lange, Ex parte, 18 Wall. 163 ..... 4, 5, 6, 10
Lewis v. *United States*, 146 U. S. 370 11
List v. *Pennsylvania*, 131 U. S. 396 5
McDowell v. *Johnston*, 36 F. Supp. 902 12
Menken v. *Atlanta*, 131 U. S. 405 5
Meyers v. *United States*, 116 F. (2d) 601 13
Miller v. *Aderhold*, 288 U. S. 206 13
Miller v. *United States*, 4 F. (2d) 228, certiorari denied, 268 U. S. 692 10
Miller v. *United States*, 128 F. (2d) 519, certiorari denied, October 12, 1942 (No. 150 present term) 13
Millich v. *United States*, 282 Fed. 604 10
Moss v. *United States*, 23 App. D. C. 475 ..... 3, 7
Murphy v. *United States*, 285 Fed. 801 10
Nagel v. *The People*, 229 Ill. 598 11
Peck v. *United States*, 65 F. (2d) 59 11
Price v. *Zerbst*, 268 Fed. 72 12
Priori v. *United States*, 6 F. (2d) 575 10
Robinson, Ex parte, 19 Wall. 505 3
Robinson v. *Johnston*, 118 F. (2d) 998, certiorari granted and case remanded for further proceedings, 316 U. S. 649 13
Rowley v. *Welch*, 114 F. (2d) 499 9
Salazar v. *United States*, 236 Fed. 541 10
Schwab v. *Berggren*, 143 U. S. 442 ..... 11, 12
Spirou v. *United States*, 24 F. (2d) 796, certiorari denied, 277 U. S. 596 10
Terry, Ex parte, 128 U. S. 289 11
United States v. *Benz*, 282 U. S. 304 9
United States ex rel. Campbell v. *Bishop*, 47 F. (2d) 95 10
United States ex rel. Coleman v. *Cox*, 47 F. (2d) 988 12
United States v. *Healy*, 202 Fed. 349 9
United States v. *Mazzochi*, 75 F. (2d) 497 9
United States v. *Phillips*, 6 Pet. 776 5
United States v. *Wittmeyer*, 89 F. (2d) 660 5
Waterman, Ex parte, 33 Fed. 29 12
Wells v. *United States*, 124 F. (2d) 334, certiorari denied, 316 U. S. 661 13
Wilson v. *United States*, 26 F. (2d) 215 3
Yatovsky v. *United States*, 1 F. (2d) 169 7

Statutes:

Judicial Code:
Sec. 126 (28 U. S. C. 223) 4
Sec. 268 (28 U. S. C. 385) 3
18 U. S. C. 541 12
18 U. S. C. 641 8

Miscellaneous:

	Page
49 A. L. R. 494	7
Certificate, Clerk of U. S. Circuit Court of Appeals, dated December 28, 1942	15
Certificate, Judge Maris, dated December 28, 1942	16
Letter from the Director, Administrative Office of the United States Courts to Solicitor General, dated December 3, 1942	17
Rule 3 of the Circuit Court of Appeals for the Third Circuit in effect February 1, 1942	4

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 473

IN RE WILLIAM V. BRADLEY, PETITIONER

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES

STATEMENT

Petitioner was on September 28, 1942, adjudged by the Circuit Court of Appeals for the Third Circuit guilty of criminal contempt because of his intimidation of a witness in a corridor adjoining the courtroom of the court, and was sentenced to imprisonment for a period of six months and to pay a fine of $500. He was to stand committed until compliance with the sentence. The Marshal was directed to execute the judgment forthwith (R. 40, 69–70). Pursuant to this direction, according to petitioner (Br. 7), he was taken immediately into custody. The record shows only, with

reference to what transpired subsequent to the imposition of sentence, that on October 1, 1942, the $500 fine was paid in cash to the clerk of the Circuit Court of Appeals by one of petitioner's attorneys (R. 2) and that thereafter on the same day an "Order Amending Judgment" was filed (R. 2, 70–71). This order so amended the language of the prior judgment as to delete the fine and retain the six months' term of imprisonment.[1]

Since no opinion accompanied the amendatory order, and the record does not disclose the circumstances under which it was entered, we have obtained two certificates, one from Judge Maris, the senior of the two circuit judges presiding at the contempt hearing, and one from the clerk of the Circuit Court of Appeals, which we have printed in the Appendix, *infra*, pp. 16–18. These certificates, with another from the clerk appearing in the Appendix to petitioner's brief (Br. 34–35), disclose that the fine was paid to the clerk of the court below by one of petitioner's attorneys prior to 11:30 o'clock on the morning of October 1; that not having as clerk of a circuit court of appeals ever received a fine, the clerk consulted with Judge Maris as to its disposition; that Judge Maris advised him to consult the clerk of the district court, who was familiar with the handling of

[1] It obviously did not increase the term of imprisonment, as petitioner asserts (Br. 31–33).

fines; that subsequently on the same day the Assistant United States Attorney who participated in the contempt proceeding advised Judge Maris that "the imposition of a fine and imprisonment for a summary contempt was questionable";[2] that later in the afternoon of October 1, after banking hours and before the fine was deposited in any official account of the court, the clerk received from the court the amendatory order deleting the fine and retaining the imprisonment, and was instructed to return the fine to petitioner's attorney; that he succeeded in contacting petitioner's attorney on the next day but the attorney refused to accept the money; that the money at the present time is in the personal custody and control of the clerk.[3] While the court was not in session on October 1, 1942, the date the amendatory order was filed (Certificate, Pet. Br. 35), the court had not adjourned for the term at which the original sentence

---

[2] The imposition of both fine and imprisonment was erroneous. Section 268 of the Judicial Code (28 U. S. C. 385), provides, in part: "The courts of the United States shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority * * *." See *Ex parte Davis*, 112 Fed. 139, 142 (C. C. D. Fla); *Wilson* v. *United States*, 26 F. (2d) 215, 216 (C. C. A. 8); *Clark* v. *United States*, 61 F. (2d) 695, 709 (C. C. A. 8), affirmed, 289 U. S. 1; *Moss* v. *United States*, 23 App. D. C. 475, 485; see also *Ex parte Robinson*, 19 Wall. 505, 512.

[3] The clerk advises that he will continue to hold it until the final disposition of the case.

was entered[4] (Certificate, Appendix hereto, p. 17, *infra;* see also R. 1–2).[5]

DISCUSSION

Petitioner contends that the amendatory order of October 1 is void because it "was not entered in open court but merely filed with the Clerk in the absence of petitioner and his counsel * * *; without notice to petitioner or his counsel and while petitioner was effectually prevented from being present by the previous sentence of the court." (Br. 28). We believe this point is well

[4] A new term did not start until October 5, 1942. Section 126 of the Judicial Code (28 U. S. C. 223), so far as pertinent, provides: "A term shall be held annually by the circuit courts of appeals in the several judicial circuits at the following places, and at such times as may be fixed by said courts, respectively: * * * in the third circuit, in Philadelphia; * * *." Rule 3 of the Circuit Court of Appeals for the Third Circuit in effect February 1, 1942, provides that "One term of the court shall be held annually commencing on the first Monday of October. * * *"

[5] Presumably the above facts may be considered by this Court since they are facts which were within the knowledge of the court below and of its clerk when the amendatory order was entered. In *Ex parte Lange*, 18 Wall. 163, the fact that the fine had been paid to the court clerk and by him deposited into the Treasury (p. 164) appears, according to the dissenting opinion (pp. 180, 190, 199–200), to have been disclosed pursuant to a certificate by the clerk. In appeals under the Criminal Appeals Act it is, of course, a familiar practice to establish by certificate of the district judge that his decision involved the construction of the statute on which the indictment was based and not the sufficiency of the indictment as a pleading. The certificates would seem to stand on a parity with an opinion reciting the material facts.

taken and that the case should be remanded to the circuit court of appeals for further proceedings in connection with the sentence. For this reason it would seem unnecessary to discuss petitioner's contentions with respect to the merits of his conviction (Br. 10–22), or, except incidentally, his further contention that the court's jurisdiction over the case was exhausted upon payment of the fine[6] (Br. 24–27).[7]

It is the position of petitioner that the decision of this Court in *Ex parte Lange*, 18 Wall. 163, conclusively establishes that the court below lacked power to amend its original judgment as was done (Br. 25). The *Lange* case has been regarded generally as establishing the broad propositions that when a court has imposed a fine and im-

[6] What petitioner means, of course, is that the court had power to enter no other amendatory order than one concluding the imprisonment.

[7] The court's disposition of the case on a remand may finally dispose of the litigation. Thus, if the court on remand should decide to accept the fine and terminate the imprisonment, the judgment would be satisfied (*Ex parte Lange*, 18 Wall. 163) and there would be no questions presentable by petitioner to this Court for review. Cf. *Bergdoll* v. *United States*, 279 Fed. 404 (C. C. A. 3), certiorari denied, 259 U. S. 585; see also *United States* v. *Phillips*, 6 Pet. 776; *List* v. *Pennsylvania*, 131 U. S. 396; *Menken* v. *Atlanta*, 131 U. S. 405; *United States* v. *Wattmeyer*, 89 F. (2d) 660 (C. C. A. 9); *Fiske* v. *Commissioners of District of Columbia*, 38 App. D. C. 120, 122, 123. Compare *Hartwell* v. *United States*, 107 F. (2d) 359, 360 (C. C. A. 5) (where the fine was but one element of the judgment).

prisonment where the statute only confers power to punish by fine or imprisonment, and the fine has been paid, the court cannot, even during the same term, modify the judgment by imposing imprisonment; that the judgment of the court having been executed so as to be a full satisfaction of one of the alternative penalties of the law, the power of the court as to the offense is at an end; and that a second judgment on the same verdict is, under such circumstances, void for want of power, affords no authority to hold the party a prisoner, and he must be discharged. Factually the *Lange* case, it seems to us, stands on a narrower basis, and, therefore, is distinguishable from the instant case. In the *Lange* case it was recognized that at the time of the attempted correction the fine had "passed into the Treasury of the United States, and beyond the legal control of the court, or of any one else but the Congress of the United States" (p. 175). We think the references to this fact in the opinion were not immaterial; that the losing by the trial court of control of the money was a significant factor underlying the reasoning of this Court that the conceded power of modification which a court has over its judgments during the term could not be effectively exercised in the case before it (cf. p. 175 with p. 167 of the majority opinion and with p. 200 of the minority opinion). In the instant case, however, the fine had not passed beyond the control of the

court below when it entered its amendatory order deleting it and retaining the imprisonment.[5] But the same court which entered that order rejected the distinction, although we think wrongly, in its opinion in *Yavorsky* v. *United States*, 1 F. (2d) 169, a case substantially identical with the instant case. Its position in that case was that it was of no concern to the defendant whether the money was still within the court's control at the time of the attempted amendment since the defendant had as fully suffered a permitted alternative punishment when he paid the fine as if the fine had been forthwith deposited into the Treasury of the United States. It is also true that there are several state decisions, principally by the Illinois Supreme Court, and a decision by the Court of Appeals for the District of Columbia (*Moss* v. *United States*, 23 App. D. C. 475, 485) which expressly hold, in reliance upon the *Lange* decision, as well as other state decisions which recognize, that the prisoner is entitled to his discharge after he has paid the fine.[6] These decisions, we believe, incorrectly extend the *Lange* case beyond its peculiar facts.

---

[5] This would have been true even if the clerk of the circuit court of appeals had deposited the fine in the same manner as his other collections. See letter from the Director, Administrative Office of the United States Courts, to the Solicitor General, dated December 3, 1942 (Appendix *infra*, pp. 18–20).

[6] These state decisions are collected in an annotation in 49 A. L. R. 494.

In view, however, of the existing authorities it must be apparent that petitioner has a point of considerable substance as to the power of the court below, in view of the payment of the fine, to have entered any amendatory order other than one terminating the imprisonment. If he had been heard upon that point it is possible, in the light of his argument and the supporting authorities which he could advance,[10] that the court might have concluded that it should accept the fine and end the imprisonment. The court might have been persuaded on other grounds to amend by eliminating the imprisonment rather than the fine.[11] While the certificates of Judge Maris and of the court clerk indicate that (except, perhaps, with reference to the element of possible hardship in raising the fine) the court below may have been aware of all factual matter pertinent to a determination as to whether it could and should make the amendment,

---

[10] The certificates do not reveal that the court gave consideration to these authorities before making its amendatory order, and it would appear from conversation with the Assistant United States Attorney to whom reference has been made that it had not done so.

[11] While petitioner does not allude to any hardship, financial or otherwise, in raising the fine, and the prompt payment of it would seem to indicate otherwise, particularly since petitioner had six months in which to pay it before he could be imprisoned for its nonpayment (cf. 18 U. S. C. 641), we are left in ignorance as to whether he could have shown that the money was obtained under such circumstances as might have been conducive to the elimination of the imprisonment.

it cannot be gainsaid that petitioner at least had a substantial legal argument which might have swayed the decision.

The amendment was not one of the types which ordinarily may be made in the absence of the defendant or his counsel. While the court undoubtedly thought that it was merely decreasing the punishment which it had originally given and therefore there was no occasion to call petitioner or his attorney before it,[12] the court was under some authorities relied upon by petitioner (*supra*, p. 7) directing an invalid increase in punishment.[13]

Nor did the amendment fall within that category wherein a court may, without notice to a defendant or his counsel, eliminate the manifestly invalid portion of a sentence, leaving the valid portion to stand (*Ainsworth* v. *Sanford*, 104 F. (2d) 96 (C. C. A. 5); *Garrison* v. *Reeves*, 116 F. (2d) 978, 979 (C. C. A. 8).[14] The original sentence of the court below was not, according to the *Lange* decision (pp. 174–175), wholly void. Either of the punishments was one alternatively

---

[12] Cf. *United States* v. *Benz*, 282 U. S. 304, 306; *United States* v. *Healy*, 202 Fed. 349 (D. Mont.).

[13] Compare *Hatem* v. *United States*, 42 F. (2d) 40, 41 (C. C. A. 4); *De Maggio* v. *Coxe*, 70 F. (2d) 840 (C. C. A. 2); *Rowley* v. *Welch*, 114 F. (2d) 499, 500 (App. D. C.).

[14] See also *Fleisher* v. *United States*, 302 U. S. 218, 220; *Blitz* v. *United States*, 153 U. S. 308, 318; *Hewitt* v. *United States*, 110 F. (2d) 1, 11 (C. C. A. 8), certiorari denied, 310 U. S. 641; *D'Allessandro* v. *United States*, 90 F. (2d) 640 (C. C. A. 3); *United States* v. *Mazzochi*, 75 F. (2d) 497, 498

permitted by the statute. The court undoubtedly, of its own motion, could have vacated either punishment before it was satisfied (*Lange*, p. 174), but when either was satisfied the court was without power to compel execution of the other; that would constitute double punishment for the same offense. Here the crucial question was whether, notwithstanding the payment of the fine, the court could cause its satisfaction by restoring the fine to petitioner; if not, the requirement of imprisonment would be a second punishment for petitioner's offense. The state of the law on the question made it one that was highly arguable. The situation was not one where a patently excessive portion of a sentence was being eliminated.

The amendment, also, did not fit within that group in which a court may *nunc pro tunc*, in the absence of a defendant or his counsel, correct its judgments or records to make them reflect what actually occurred, although, of course, even in such a case a defendant should be present where the issue is in doubt and must be explored by testimony. *United States ex. rel. Campbell* v. *Bishop*,

---

(C. C. A. 2); *Spirou* v. *United States*, 24 F. (2d) 796, 797 (C. C. A. 2), certiorari denied, 277 U. S. 596; *Priori* v. *United States*, 6 F. (2d) 575, 576 (C. C. A. 6); *Miller* v. *United States*, 4 F. (2d) 228, 232 (C. C. A. 7), certiorari denied, 268 U. S. 692; *Murphy* v. *United States*, 285 Fed. 801, 818 (C. C. A. 7); *Millich* v. *United States*, 282 Fed. 604, 606 (C. C. A. 9); *Salazar* v. *United States*, 236 Fed. 541 (C. C. A. 8); *Jackson* v. *United States*, 102 Fed. 473, 490 (C. C. A. 9).

47 F. (2d) 95, 96–97 (C. C. A. 5); *Peck* v. *United States*, 65 F. (2d) 59, 65 (C. C. A. 7); *Downey* v. *United States*, 91 F. (2d) 223, 230–235 (App. D. C.); *Foster* v. *Zerbst*, 92 F. (2d) 950, 952 (C. C. A. 10). See also *Nagel* v. *The People*, 229 Ill. 598, 606 (1907). Here there was a judicial, not a clerical, error and the correction of it might have been influenced by argument.

The amendment here seems more akin to an initial sentence than the modifications which have been mentioned. It is a general rule that a sentence may not be pronounced against a defendant in a federal criminal case unless he is present, except, of course, where he has waived the right to be present by voluntarily absenting himself, a factor not here present. There is no reason to suppose that a different rule applies in a federal criminal contempt case. *Diaz* v. *United States*, 223 U. S. 442, 455–459; *Schwab* v. *Berggren*, 143 U. S. 442, 448; *Ball* v. *United States*, 140 U. S. 118, 131; *Anderson* v. *Denver*, 265 Fed. 3, 5 (C. C. A. 8); see also *Ex parte Terry*, 128 U. S. 289, 310–314; *Blackmer* v. *United States*, 284 U. S. 421, 440.[15] The *raison d'etre* of the rule is, of course, *inter alia*, that a defendant may have opportunity to advance any reason he may have why, despite the verdict, finding, or confession of

[15] There is language in the *Diaz* case (p. 455) and in *Lewis* v. *United States*, 146 U. S. 370, 372, indicating that the presence rule may be confined to felonies. A federal criminal contempt may probably be analogized to a felony since the

guilt, he should not be sentenced at all;[16] or he may be able to suggest some ameliorating circumstance which may persuade to leniency in the sentence. While some of the lower court decisions, generally by way of dictum, too sweepingly declare, we think, that no change or modification may validly be made in a sentence without the defendant being present, no matter how informal or unimportant may be the amendment, and, indeed, although the amendment may actually benefit the defendant,[17] the amendment here was not *pro forma* or clearly insubstantial in character but an amendment which, if petitioner's contentions and authorities be accepted, resulted in an unauthorized increase in punishment. For this reason, and also because, if the court decided it had a free hand to change the sentence, the change was a matter involving discretion as to the form it would take, we believe that the court should have heard petitioner before it made the amendment.

There would seem to be no doubt as to the

---

court, under the statute, may impose a sentence of imprisonment exceeding a year. 18 U. S. C. 541. In the *Ball* case (p. 129) it is stated that "At common law no judgment for a corporal punishment could be pronounced against a man in his absence."

[16] *Ball* v. *United States*, *supra*, at p. 131; *Schwab* v. *Berggren*, *supra*, at pp. 446–447; *Anderson* v. *Denver*, *supra*, at p. 5.

[17] See *United States ex rel. Coleman* v. *Cox*, 47 F. (2d) 988, 990 (C. C. A. 5); *McDowell* v. *Johnston*, 36 F. Supp. 902, 904 (N. D. Cal.); *Fels* v *Snook*, 30 F. (2d) 187 (N. D. Ga.); *Price* v. *Zerbst*, 268 Fed. 72 (N. D. Ga.); *Ex parte Waterman*, 33 Fed. 29 (N. D. N. Y.).

power of the court below, if the case is remanded, to give further consideration to what its ultimate sentence should be after hearing argument. A void portion of a sentence may be eliminated at any time regardless of the expiration of the term at which it was entered.[12] One or the other of the punishments imposed by the original sentence is void. The determination must be which one is to remain. If the imprisonment portion of the sentence is now void because of the payment of the fine, the imprisonment may be terminated. If the imprisonment portion of the sentence may stand, the petitioner may not, of course, validly be subjected also to the fine, and that portion of the sentence can undoubtedly be eliminated regardless of the expiration of the term, the fine not yet having passed into the

[12] *Miller* v. *United States*, 128 F. (2d) 519, 520 (C. C. A. 5), certiorari denied, October 12, 1942 (No. 150, present term); *Gilmore* v. *United States*, 124 F. (2d) 537, 538–539 (C. C. A. 10), certiorari denied, 316 U. S. 661; *Wells* v. *United States*, 124 F. (2d) 334 (C. C. A. 5), certiorari denied, 316 U. S. 661; *Robinson* v. *Johnston*, 118 F. (2d) 998, 1000 (C. C. A. 9), certiorari granted and case remanded for further proceedings, 316 U. S. 649; *Garrison* v. *Reeves*, 116 F. (2d) 978, 979 (C. C. A. 8); *Meyers* v. *United States*, 116 F. (2d) 601, 603 (C. C. A. 5); *DeBenque* v. *United States*, 85 F. (2d) 202, 207 (App. D. C.), certiorari denied, 298 U. S. 681; *Copeland* v. *Archer*, 50 F. (2d) 836, 839 (C. C. A. 9); *Biddle* v. *Thiele*, 11 F. (2d) 235, 237 (C. C. A. 8); *Hammers* v. *United States*, 279 Fed. 265, 266–267 (C. C. A. 5); *Bryant* v. *United States*, 214 Fed. 51, 53–54 (C. C. A. 8); see also *Holiday* v. *Johnston*, 313 U. S. 342, 349; *Miller* v. *Aderhold*, 288 U. S. 206, 210–211; *In re Bonner*, 151 U. S. 242, 259–260.

Treasury of the United States. If there is a choice there is discretion. These are problems for the resolution of the court below in the performance of a function peculiarly its own, the choice of pains and penalties. Where the exercise of that function is complicated, as it is here, by the presence of a highly contestable question, this Court should not be required to review a judgment which has been passed without having the benefit of the decision of the court below after the hearing of argument.

CONCLUSION

For the reason stated, it is respectfully submitted that the amended judgment of the circuit court of appeals should be vacated and the cause remanded to that court with instructions that the defense be afforded an opportunity to be heard before final action is taken on the sentence and that pending such action the petitioner should be allowed to be at large, as he is now, on appropriate bail.

CHARLES FAHY,
Solicitor General.

WENDELL BERGE,
Assistant Attorney General.

OSCAR A. PROVOST,
JOHN FORD BAECHER,
W. MARVIN SMITH,
Attorneys.

JANUARY 1943.

APPENDIX

In the United States Circuit Court of Appeals for the Third Circuit

No. 8140

In re William V. Bradley

(Original—Criminal contempt)

I, William P. Rowland, Clerk of the United States Circuit Court of Appeals for the Third Circuit, certify that on October 1, 1942, prior to eleven o'clock in the morning, Timothy J. McElroy, one of the attorneys for William V. Bradley, came into my office and paid to me in cash the sum of five hundred dollars ($500.00) to satisfy that part of the judgment of the said court which imposed a fine in that amount upon the said William V. Bradley. I at first intended to deposit this in the Registry of the court, but the receipt of a fine being a novelty in my court, I decided to consult Judge Maris, who had presided at the contempt hearing, as to its disposition and did so forthwith. Judge Maris suggested that I get in touch with the Clerk of the United States District Court at Philadelphia, who would be more familiar with the handling of a fine. I subsequently, on the same day, did confer with the Clerk of the District Court, but before I had time to make deposit of the money and after banking

hours had closed, I received from the court an order amending the judgment or sentence theretofore entered, by directing the elimination of the fine of five hundred dollars, but reimposing the sentence of six months imprisonment, and was informed by the court that I was to return the fine to Mr. McElroy. I was unable to contact Mr. McElroy that day, but did so on the following day, October 2, 1942, and he refused to accept the return of the money, which has since remained in my personal custody.

I further certify that the United States Circuit Court of Appeals for the Third Circuit has but one term per year, which commences on the first Monday of October and continues until the first Monday of October in the following year. This whole transaction therefore took place during the October Term, 1941, as there had been no adjournment of that term.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this 28th day of December, 1942.

[SEAL] /s/ WM. P. ROWLAND,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 8140

IN RE WILLIAM V. BRADLEY

I, Albert B. Maris, Judge of the Circuit Court of Appeals for the Third Circuit, hereby certify

that on October 1, 1942, in the forenoon, Mr. William P. Rowland, Clerk of the Circuit Court of Appeals for the Third Circuit, consulted with me relative to the disposition of the fine of Five Hundred Dollars ($500) paid to him in cash on behalf of the petitioner herein.

I further certify that subsequently, on the same day, Mr. Thomas J. Curtin, Assistant United States Attorney, called my attention to the fact that the imposition of a fine and imprisonment for a summary contempt was questionable.

I further certify that later, during the afternoon of the same day (October 1, 1942) an amendatory order was sent to the Clerk of the Circuit Court of Appeals eliminating the fine from the sentence, and, at the same time, I instructed Mr. Rowland to return the fine to the petitioner's attorney.

In testimony whereof, I hereunto subscribe my name, at Philadelphia, this 28th day of December A. D. 1942.

/s/ ALBERT B. MARIS, *J.*

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

SUPREME COURT BUILDING

Washington, D. C., December 3, 1942.

Honorable CHARLES FAHY,
Solicitor General,
Department of Justice, Washington, D. C.

DEAR MR. FAHY: In response to your letter of November 25, 1942, requesting information regarding the practice ordinarily followed by the

clerk of a United States court after a fine imposed is paid, I am glad to give you the following outline:

A fine collected by the clerk of a court is deposited with all collections, other than registry funds, in a local depositary for transmittal to the Treasurer of the United States for credit to the clerk's trust fund receipt account, in accordance with 31 U. S. C., 725 (r) and 28 U. S. C., 544.

The earned portions of the funds in that account, and fines properly collected, are transferred to the appropriate general fund receipt accounts in the Treasury after certification by this office to the Treasury Department of the clerk's trust fund transfer voucher at the end of the quarterly accounting period (March 31st; June 30th, September 30th and December 31st). From time to time the Treasury Department appropriates from the trust fund receipt account sufficient funds for advancement to the clerk's checking account upon requisition of this office at the request of the clerk, in accordance with 31 U. S. C., 725 (r), upon which checking account he may draw for his usual financial transactions, including the return of moneys erroneously or excessively collected.

If error in the collection of a fine is discovered after the clerk has made to this office his quarterly accounting in which he has requested the transfer of the fine from his trust fund receipt account to the appropriate general fund receipt account, the error may still be corrected by the return of the transfer voucher by this office to the clerk for removal of the item at any time prior to certifica-

tion of the transfer voucher to the Treasury Department.

A fine is beyond recall by the clerk only after it has been transferred into the general fund receipt account following certification by this office. Thereafter a refund would be obtainable only upon presentation of a claim to the General Accounting Office. On approval of such claim by that office the refund would be payable out of an annual Congressional appropriation, refunding moneys erroneously received and covered into the Treasury.

Sincerely yours,

/s/ HENRY P. CHANDLER, *Director.*

U. S. GOVERNMENT PRINTING OFFICE: 1942

SUPREME COURT OF THE UNITED STATES.

No. 473.—October Term, 1942.

In re William V. Bradley, Petitioner. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[February 1, 1943.]

Mr. Justice Roberts delivered the opinion of the Court.

A proceeding, instituted by the National Labor Relations Board against Delaware-New Jersey Ferry Company for enforcement of an order of the Board, was pending in the Circuit Court of Appeals. A hearing was set at which witnesses were to be heard. The petitioner was to be a witness for the Board. During the course of the trial the petitioner was summoned and, after hearing, was adjudged guilty of contempt because of his intimidation of a witness for the Ferry Company in the corridor adjoining the court room.

The court sentenced the petitioner to six months' imprisonment, to pay a fine of $500, and to stand committed until he complied with the sentence. The sentence was erroneous; *Ex parte Lange*, 18 Wall. 163, 176. Under § 268 of the Judicial Code, 28 U. S. C. 385, the sentence could only be a fine *or* imprisonment. *Ex parte Robinson*, 19 Wall. 505, 512; *Clark* v. *United States*, 61 F. 2d 695, 709; affirmed 289 U. S. 1.

The marshal was directed forthwith to execute the judgment. On September 28, 1942, the petitioner was taken into custody and committed to prison. On October 1 his attorney paid the fine in cash to the clerk of the court. Later on that day the court, realizing that the sentence was erroneous, delivered to the clerk an order amending it by omitting any fine and retaining only the six months' imprisonment. The court instructed the clerk, who still held the money, to return it to the petitioner's attorney. The latter refused to receive it, and the clerk has it.

The petitioner, being in jail, petitioned this court to grant certiorari, alleging as errors the adjudication that he was guilty

of contempt and the manner of sentencing him. We granted the writ and admitted him to bail pending decision.

We do not review the finding that the petitioner's conduct was a contempt summarily punishable by the court, for we are of opinion that the errors involved in the sentence require that he shall be freed from further imprisonment.

When, on October 1, the fine was paid to the clerk and receipted for by him, the petitioner had complied with a portion of the sentence which could lawfully have been imposed. As the judgment of the court was thus executed so as to be a full satisfaction of one of the alternative penalties of the law, the power of the court was at an end.[1] It is unimportant that the fine had not been covered into the treasury; it had been paid to the clerk, the officer of the United States authorized to receive it,[2] and petitioner's rights did not depend upon what that officer subsequently did with the money.[3]

It follows that the subsequent amendment of the sentence could not avoid the satisfaction of the judgment, and the attempt to accomplish that end was a nullity. Since one valid alternative provision of the original sentence has been satisfied, the petitioner is entitled to be freed of further restraint.

The judgment is reversed and the cause remanded with directions that the petitioner be discharged from custody.

So ordered.

---

[1] Ex parte Lange, *supra*, 176.

[2] In re Fletcher, 107 F. 2d 666, 668.

[3] Ex parte Lange, *supra*, p. 176; and compare the dissenting opinion, pp. 180, 190, 199-200; Yavorsky v. United States, 1 Fed. 2d 169, 171; Moss v. United States, 23 App. D. C. 475, 485.

Mr. Chief Justice STONE, dissenting.

In *Ex parte Lange*, 18 Wall. 163, the trial court did not remit or offer to remit the fine which the offender had paid. The opinion was careful to point out (p. 175) that the fine paid had been covered into the treasury and that the courts were powerless to direct its return. That decision thus lends no support to that now rendered that the choice rests with the offender rather than with the court whether he shall be punished by fine or by imprisonment, either of which alone the court could have lawfully imposed; and that by payment of the fine, imposed and accepted under mistake of law and immediately remitted, he may irrevocably escape punishment by imprisonment.

So far as *Ex parte Lange* is regarded here as resting on the ground that it would be double jeopardy to compel the offender to serve the prison sentence after remission of the fine on the same day on which it was paid, I think its authority should be reexamined and rejected. The substance of the punishment imposed on the offender by a fine is in depriving him of the money he has paid. Here he has not been deprived of the money paid to the clerk of the court, for the fine was remitted on the same day on which it was paid, and he was then free to reclaim it. Since he is shown to have suffered no more from the imposition of the fine than if the clerk had refused to receive it when tendered, there is I think no substance in the contention that he will suffer double punishment if compelled to serve out his prison sentence.

The Constitution is concerned with matters of substance not of form. Nothing in its words or history forbids a common sense application of its provisions, or excludes them from the operation of the principle *de minimis*. I can hardly suppose that we would hold unconstitutional an Act of Congress commanding prompt return of a fine mistakenly imposed under these circumstances, and requiring the prison sentence originally imposed to be served. Yet *Ex parte Lange* as interpreted and applied here rests on constitutional grounds which are equally applicable to an Act of Congress.

I agree with the suggestion of the Government that the court's second order resentencing petitioner could not rightly be entered without affording petitioner or his counsel an opportunity to be present, and that the cause should, on that account, be remanded for further proceedings.